Betrothment and Marriage

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BETROTHMENT AND MARRIAGE

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BETROTHMENT
AND
MARRIAGE

A CANONICAL AND THEOLOGICAL TREATISE

WITH

NOTICES ON HISTORY AND CIVIL LAW

BY

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PROFESSOR OF THEOLOGY IN THE GRAND SÉMINAIRE DE BRUGES.

REVISED AND GREATLY ENLARGED BY THE AUTHOR

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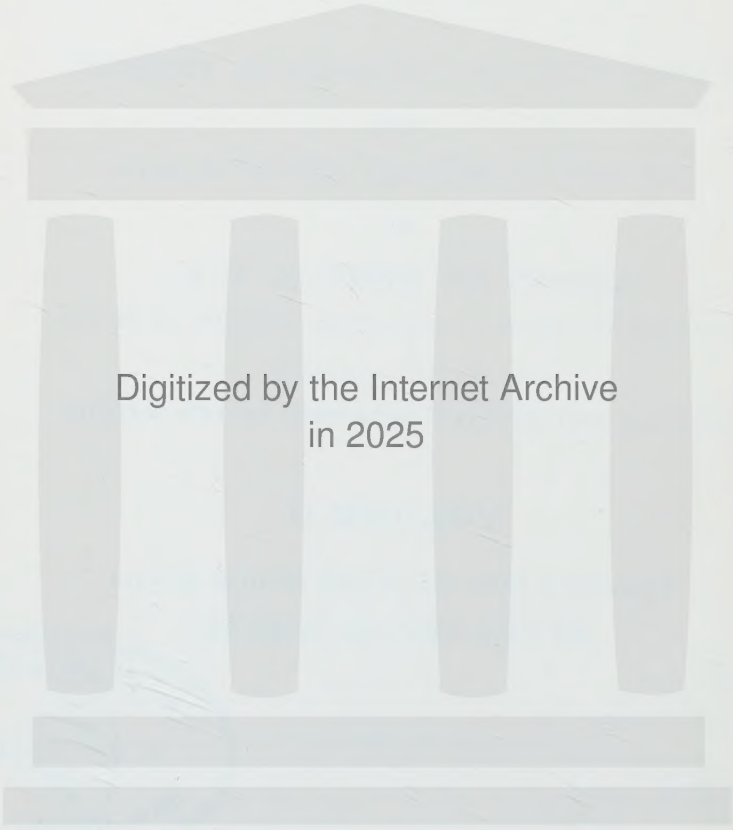
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ADDENDA.

I.

The following works, of which we have made use in the revision of the second volume, should be added to the Bibliography :

Arendt, *Relectio analytica super controversia de impotentia feminae ad generandum*, Romae, 1913.

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Ferreres, *De Vasectomia duplici necnon de matrimonio mulieris excisae*, ed. altera, Madrid, 1913.

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Terlinden, *Le nouveau code civil suisse*, in *Pasicrisie Belge*, 1912, 15 août-30 sept., p. 1-42.

Wieland K., *Das sechste Gebot und die Ehe — Ein offenes Wort an Eheleute, Eltern, Erzieher, Aertze und Geistliche*, Augsburg, 1912.

E. Wilhelm, *Die künstliche Zeugung beim Menschen und ihre Beziehungen zum Recht*, Halle, 1911.

—— *Beseitigung der Zeugungsfähigkeit und Körperverletzung, de lege lata und de lege ferenda*, Halle, 1911.

Wordsworth, *The Law of the Church as to the marriage of a man with his deceased wife's sister*, London, 1908.

II.

1. At the last moment there has come into our hands the *Supplementum alterum* of Bucceroni (1). The distinguished Author there gives, on page 103 (n° 1049), the text of two decrees of the Holy See which had hitherto escaped our notice. The first of these decrees emanates from the S. Congregation of the Propaganda and is dated 20 March 1909, the second was issued by the S. Congregation of the Sacraments, November 1909 ; both of them have reference to Article VIII of the Decree *Ne Temere*. The reader will see at a glance that the doctrine set forth by us, in n° 69 of the present treatise, is fully confirmed therein (2) ; he will also observe that the Holy See has there laid down certain formalities to be observed when marriage is celebrated without a priest.

The following is the text of these two decrees (3) :

---

1. The full title of the book is : *Supplementum alterum editionis quartae et quintae Institutionum Theologiae Moralis et editionis quartae Enchiridion Moralis, complectens recentissima Acta S. Sedis et decreta SS. Congregationum*, Romae, 1911.

2. We may also refer the reader to an article, dealing with the same controversy, that we contributed to the *Nouvelle Revue Théologique*, 1913, p. 140 ss.

3. According to the information that Father Bucceroni has kindly given us, the first decree concerns a case that occurred in the Island of Curaçoa, where the anteriority of civil marriage is obligatory and enforced by legal penalties.

1049. — *Defectus formae.*

« 1° An et sub quibus cautelis annuendum sit, ut oratores matrimonium in facie Ecclesiae contrahere valeant, quamvis civilem ritum explere nequeant ?

2° Quaenam dispensatio circa matrimonii celebrandi formam concedenda sit, cum ratione civilis legis parochus matrimonio assistere non possit ? »

« R. (ad 1m) Parochus catholicus constito primum sibi nullum inter contrahentes intercedere canonicum impedimentum.... permittat ut, absque etiam sua adsistentia, matrimonium ineant, sed tamen praesentibus tribus aut saltem duobus testibus integrae fidei ; ac ita celebrato matrimonio teneantur conjuges, citius quam fieri potest, illud parocho significare, qui in codice matrimoniorum illud saltem secreto adnotet cum indicatione diei ac nominibus testium qui praesentes fuerunt ». S. C. de Prop. Fid., 24 Mart. 1909.

(ad 2m) « Ordinarius, constito primum sibi etiam, si opus fuerit, per juratam contrahentium attestationem, nullum inter ipsos intercedere canonicum impedimentum, permittat, ut absque praesentia Parochi matrimonium in casu valide et licite iniri possit, emisso a sponsis formali consensu coram duobus testibus ; imposito ad normam N. IX. Decreti *Ne temere* testibus in solidum cum contrahentibus onere curandi, ut initum conjugium quamprimum parocho significetur, qui in libro matrimoniorum illud saltem secreto adnotet cum indicatione diei et nominibus testium, qui praesentes fuerunt. Idem autem Ordinarius hortari non omittat nupturientes, ut ad Sacramentum Confessionis et SS. Eucharistiae debitis cum dispositionibus accedant ante matrimonii celebrationem, ac insuper curet, ut iidem contrahentes se obligent ad formalitates civiles explendas statim ac fieri poterit, cujus obligationis documentum in Curia Episcopali adservetur ». S. C. de Sacram., (26) Nov., 1909.

The second decree was issued at the instance of the Ordinary of Breslau. in favour af a soldier living in concubinage who, being expatriated in consequence of his evasion of military service, could not obtain from his own country the necessary documents, without which the civil law of Prussia did not permit him to contract a civil marriage, while, on the other hand, in default of a civil marriage the parish priest could not celebrate the religious marriage without exposing himself to the penalties provided by law. The Sacred Congregation replied that, under these circumstances, the Ordinary could permit the celebration of the religious marriage without the assistance of the priest, « emisso a sponsis formali consensu coram duobus testibus », according to the terms of the Decree *Ne Temere*, Article VIII,but with the observance of certain conditions mentioned in the text.

2. We think it right to call attention, in the same work of Bucceroni, page 24 (n° 973), to another decree of the S. Congregation of the Sacraments (March 1909), relating to the question as to how far and under what restrictions the omission of the civil formalities of marriage is permissible — a question that we have dealt with in n° 233. The following is a translation of the Italian text :

973. *Matrimonium Civile.*

The Ordinaries of Italy have frequent recourse to this Congregation of the Discipline of the Sacraments, for the purpose of submitting to the judgment of this same congregation the position of those among their subjects, who, being prevented for the time being from supplementing the religious marriage by the civil formalities, request that in a particular case, an exception may be made with reference to what is prescribed by the Instruction, given at the direction of Pius IX, of holy memory, by the S. Penitenzieria, on Jan. 16,1866, concerning the supplementing of the civil formalities, and that they may be permitted to celebrate christian marriage alone.

This Sacred Congregation, therefore, wishing to give the above mentioned Ordinaries opportune and safe principles, by means of which they may themselves, without the necessity of recourse to the Holy See, provide for the spiritual needs of the faithful entrusted to their charge, has, in the General Session of March 26,1909 and with the approbation of his Holiness Pope Pius X, laid down the following rules :

1° Those who, being civilly married to a person from whom they have actually separated, ask to be admitted to a religious marriage with another person,must first of all have obtained from the civil court a legal separation from the supposed partner ; whether it be for the purpose of safeguarding the sacrament from the danger of profanation, or of preventing the rejected partner from making any legal claim to access and cohabitation.

This arrangement may however admit of exception in a special and extraordinary case, that is, when, it is not possible to obtain a legal separation and on the other hand the Ordinary is morally certain that the other party will never make a legal claim for the restoration of conjugal rights, against the party who makes his peace with God by a christian marriage, nor make any complaint on that account *against him*.

2° The above-mentioned, and others also who are not married civilly, but who for special reasons are prevented from fulfilling the civil formalities, must, before being admitted to the celebration of the religious rite, give a written undertaking in the presence of a person delegated for this

object by the ordinary and two witnesses, and if they are minors, with the consent of their parents or their representatives, to fulfil the said formalities at a time to be determined according to the circumstances, the persons to be married assuming the entire responsibility of the consequences which may follow from failure to discharge the said obligation.

3° Finally, the Ordinary must be morally certain that after the celebration of the religious marriage, the contracting parties will never wish to separate.

With these precautions and others intimated in the particular case, the Ordinary will judge in his conscience whether he may permit the omission of the civil formalities, having regard also to the circumstances, to the condition of the parties, and to the greater or less publicity which is to be given to the marriage celebrated before the Church.

S. C. de Sacram. March 1909.

3. P.Durieux, o.c.,gives the text of a decree of the S.Congregation of the Sacraments, of 18 March 1913. This decree was not made public, and we do not vouch for its authenticity. Its answer to question c is of a nature to modify the solution that we gave in n° 381, 4, in a note in accordance with a decision given for the diocese of Bruges in 1911. The following is the text as given by P. Durieux :

a) Une dispense accordée pour le deuxième degré, alors que l'empêchement est au troisième, est-elle valide ? — *Negative.*

b) Une dispense accordée pour le troisième degré, alors que l'empêchement est du deuxième au troisième, est-elle valide ? — *Negative.*

c) Une dispense accordée pour le deuxième degré, alors que l'empêchement est du deuxième au troisième, est-elle valide ? — *Affirmative,* mais s'il y a eu erreur, il faudra l'exposer à la S. Congrégation, qui délivrera une simple déclaration de validité de la dispense.

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30	8	daugther	daughter
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137	20 (» »)	3.	2.
138	8 (» »)	familly	family
141	18	oi	of
151	8 *(from foot)*	ihe	the
161	18 (» »)	anul	annul
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212	16 *(from foot)*	neverthelsess	nevertheless
223	*(margin)*	364	346
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Part II

IMPEDIMENTS TO MARRIAGE

Section I

IMPEDIMENTS IN GENERAL

Paragraph I. DEFINITION OF IMPEDIMENT. THE DIFFERENT KINDS.

I. Definition.

234. *Definition of impediment.*

An *impediment to marriage* is any circumstance that renders the matrimonial *contract* invalid or illicit. This definition is to be understood of those circumstances that relate directly to marriage *as a contract*; consequently circumstances that directly affect the sacrament and render the reception of it invalid or illicit, such as mortal sin and the want of intention to receive the sacrament, are not, properly speaking, impediments to marriage (1). Nor must we reckon among impediments *strictly so called* those circumstances which, though having relation to the matrimonial contract, are common to every kind of contract, as for example error and insanity. Nevertheless, these latter are commonly counted among the impediments; and the former also may be called impediments *in the wider sense* of the word, since those circumstances which render marriage illicit or invalid as a sacrament, render it thereby illicit or invalid as a contract, seeing that for Christians the contract and the sacrament are one and the same thing.

1. See above, n° 116, what has been said on the subject of confession in preparation for marriage. If this confession was prescribed by law, the omission of it would constitute an impediment in the wider sense of the word. See also n° 118.

II. Different kinds of impediments.

235. *The different kinds.*

1. Impediments are divided into *diriment* impediments, which render the contract null and invalid (1), and *impedient* or *prohibitive* impediments, which render the contract merely illicit.

2. They are either of *natural* law, or of *divine positive* law, or of *human* law : these last are of *ecclesiastical* law for the faithful, and of *civil* law for the unbaptized.

3. They are *absolute*, when they render the marriage null or illicit with any person whatsoever; *relative*, when they bind only in respect of certain determinate persons. Thus vow and Orders are absolute impediments ; consanguinity, affinity and crime are relative impediments.

4. They are *perpetual*, when they are, of their nature, of indefinite duration, although a dispensation from them may be obtained ; *temporary*, when they spontaneously disappear in the course of time, as in the case of the impediment of age, and that of the forbidden time.

5. Some are *anterior*, others *posterior* to the matrimonial contract ; thus affinity and spiritual relationship may supervene during the marriage.

6. Some impediments render the matrimonial contract null or illicit by affecting immediately and directly the *form* of the contract, e. g. clandestinity ; others directly affect the *persons*, such

---

1. Diriment impediments annul the contract in such a way, that it is thereby incapable of producing any effect, without any judicial pronouncement being made on the subject. Nevertheless, in the case of a marriage already contracted, the parties, before they can be completely at liberty, must obtain a *declaratory* sentence from the ecclesiastical judge, as we shall see in nos 339 and 282. Observe also that it is not open to any one indiscriminately to bring into court a marriage that has been contracted under a diriment impediment. See no 340, and also no 243 for the definition and nature of a diriment impediment in civil law. In Flemish, impediments are called respectively *verhinderende* beletsels and *verbiedende* beletsels.

Marriage contracted under a diriment impediment is invalid, null or void. Strictly speaking, marriage is said to be *null*, if it is invalid through the omission of some substantial form, and therefore on the ground of clandestinity ; it is said to be *void*, if it is rendered invalid on the ground of some other diriment impediment.

as consanguinity and vow ; others affect the *consent*, like violence, fear and error (1).

7. There are impediments of *public right*, such as consanguinity, spiritual relationship, and others, which can be alleged against a marriage by any person whatever ; and there are impediments of *private right*, of which only the married parties themselves can make use in challenging the validity of their union ; such are error, fear, and frequently impotency (2).

The division of impediments into public and occult, by nature or in fact claims special attention.

8. There are some impediments that are *secret* or *occult*, either by nature or in fact ; and there are some impediments that are *public*, likewise by nature or in fact. This last division claims special attention and a brief explanation :

a/ An impediment is said to be *occult by nature*, when it is hard to prove, or when it is of a defamatory nature. Such are affinity arising from guilty relations, illegitimate consanguinity (3), crime, a simple vow of chastity taken privately, a vow to enter Religion or to take Orders. See below, n° 346.

b/ An impediment is said to be *public by nature*, when it is easy of proof, and does not imply any disgrace that demands secrecy. Such are, among the *impedient* impediments, mixed religion, the prohibition of the Church, the forbidden time, a simple vow taken in a religious congregation, and also, it would seem, betrothment contracted under the new regime. Among the *diriment* impediments, error as to (servile) condition, defect of age, a solemn vow, Orders, disparity of worship, consanguinity, lawful affinity, public decency, spiritual and also legal relationship, and clandestinity. See below, n° 346.

c/ An impediment is said to be *occult in fact*, firstly, when it is

---

1. This sixth division applies in full to the diriment impediments, but in part also to the prohibitive impediments : e. g., omission of the publication of the banns directly affects the *form* of the contract ; mixed religion and simple vow affect the *persons*.

2. See below, n° 340. The *Instr. Austriaca*, n° 116 s., gives a complete list of them.

3. Thus in the *Monita ad missionarios provinciae Nankinensis*, p. 198, we find the text of a faculty granted to the missionaries of that vicariate, by which they receive power to dispense *in foro interno* from the occult impediment of illegitimate consanguinity. Cf. also *Das Dispensationswesen*, in *Archiv f. k. Kirchenr.* 1912, p. 492.

so secret that there is no way of proving it, not even by means of two witnesses, and it is necessary to leave the matter to the judgment of God alone ; it is then termed *altogether occult* (1). Secondly, when it is known only to a few, generally five or six in a small place, and seven or eight in a town of more importance, and when there is no reason to fear that it will soon be made public (2) ; it is then called *quasi-occult*, or, *in stylo curiae, occult* (without any qualification).

d/ An impediment is said to be *public in fact*, when it is not even quasi-occult in fact, though it may be by nature occult ; that is to say, where the impediment is known, or it is foreseen that it must soon become known, by more than five or six persons in a small place, or by more than seven or eight in a larger town. Thus, for instance, one cannot fail to see that the guilty relations of a man with the sister of his intended wife must become publicly known, if the suspicious familiarity of the two is already a matter of common talk, and the girl is enceinte.

For an impediment to be reputed public in fact, it is sufficient, according to the more probable opinion, that it should be *materially* public, though *formally* occult ; that is to say, that « the crime committed be known to the public, though they are quite in ignorance as to the diriment impediment attached to it » (3).

Every impediment, otherwise occult in fact, is reckoned public

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1. See Benedict XIV, *Institutiones*, 87, nº 44, who quotes the text of Fagnanus ; and Feye, *De Imp.*, nº 88, who adds : « It (the impediment) does not cease to be altogether occult if, besides the interested parties and their confessor, one other person has knowledge of it. It is advisable, however, to mention the fact in the petition ». Cf. Gasparri, o. c., I, nº 251.

2. Reiffenstuel, *Appendix de dispensat. super imped. matr.*, nº 46, says very rightly : « In practice we must by all means consider not only the number, but also the kind of the people who know of an impediment ; for it may very well happen that with five discreet and God-fearing persons, who are acquainted with the matter, there may be no danger of its wider circulation, while with two or three garrulous and evil-disposed persons, there is real danger of it, especially if other circumstances point in that direction ».

3. Benedict XIV, l. c., nº 41. It would be otherwise if the fault or crime, causing the impediment, were known as a fact, but not as an offence ; in that case the impediment would be regarded as occult ; e. g., if the killing of a wife were believed to be the result of an accident.

in fact from the time that it is brought into litigation, until the accused has been definitively acquitted (1).

9. Connected with the preceding division is the distinction between impediments of the *forum internum* and those of the *forum externum*. Impediments of the internal forum are such as are occult by nature as well as in fact, since a dispensation from them must be obtained only for the forum of conscience. On the contrary, impediments of the external forum are public impediments, either by nature or in fact, since a dispensation from them, at least as a rule, must be obtained for the external forum (2).

Note. Ecclesiastical law makes mention of impediments to marriage from the earliest ages of Christianity, as is proved by the canons of the councils of the fourth and fifth centuries. But the division into diriment and merely prohibitive impediments remained for a long time ill-defined, and the same impediments had now a diriment, now a prohibitive force, at different times and in different places (3). The number of impediments also was for a long time subject to fluctuations, and even at the present day authors are not all in agreement on this point.

On the concept of impediment, and its historical evolution, see ESMEIN, o. c., I, p. 205 s.; WERNZ, o. c., IV, n° 217; SCHERER, o. c., p. 114; VILLIEN, in the *Canon. contemp.*, 1903, p. 420-433, and 543-547.

PARAGRAPH II. POWER OF ESTABLISHING MATRIMONIAL IMPEDIMENTS.

236. A résumé of the principles concerning the power of establishing impediments.

Above, in n°s 216 ss., we have vindicated for the Church the exclusive right of setting up impediments for the marriages of the faithful, leaving to the civil authority the power of determining them in the case of the unbaptized. We have there defined the active and passive subject of this power; whence it follows that all are subject to the impediments of the natural and divine law,

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1. FEYE, *De Imp.*, n° 95; PLANCHARD, o. c., n° 396; see also the *N. R. th.*, XVI, p. 432. For fuller details, see the *Coll. Brug.*, t. V, p. 415 s.

2. See below, n° 346.

3. The Church in the early ages, before she took over the regulating of marriage, did not usually invalidate the marriages that she reprobated, but she prohibited them under canonical penalties.

while impediments of the ecclesiastical law bind only baptized persons, including heretics unless exempted by a particular provision.

Paragraph III. MORAL COROLLARIES.

I. Duty of a parish priest who is cognizant of an impediment (1).

237. Duty of parish priest cognizant of an impediment.

The parish priest who knows of the existence of an impediment to a marriage, otherwise than through confession, must, as a general rule, oppose the contracting of the marriage without a dispensation.

The reason of this is not only that he cannot co-operate in the sin of another, but also that he is the guardian and defender of public order, for the maintenance of which impediments have been established.

We say : *as a general rule,* because sometimes the parish priest may admit to marriage parties whom he knows to be subject to even a diriment impediment. This case occurs especially when on the one hand the impediment is occult, and on the other hand the contracting parties are in good faith, while there is reason to fear that grave evils would follow from the revelation of the impediment, and the celebration of the marriage is to take place at once ; or again, if the parties are not, or not both of them, in good faith, and the marriage cannot be postponed without danger of scandal or injury to their reputation. See below, n° 378.

II. Ignorance of a diriment impediment, and the impossibility of avoiding it.

238. Ignorance does not excuse from a diriment impediment,

Diriment impediments affect not only those who have knowledge of them, but those also who are *ignorant* of their existence. It is an incontestable legal principle that *invalidating* laws, with a view to the general good, affect even those who are ignorant of them.

We are of opinion that the impediment of *crimen* is no exception

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1. The question is here limited to the duty of the parish priest as to his assistance at the marriage ; the obligation of making known impediments has been dealt with above, in n° 44.

to this rule, though certain authors claim that it is ; for though it is directed to the punishment of the fault, it was, nevertheless, *principally* established, as we shall show below, nos 323 and 328, *for the public good*, that is to say, on account of the public indecorum of such a marriage between accomplices, and also with a view to the protection of husband and wife (1).

This is, moreover, the teaching of the Holy See. The Instruction of the C. S. O. of 9 Dec. 1874, repeats an answer given in 1854 in the following terms : « It is necessary also to observe, with regard to diriment impediments, that invincible ignorance and good faith do not suffice to render the contract of marriage valid. If it happens... that this ignorance and this good faith excuse from sin, they cannot, nevertheless, at any time make valid a marriage that is null through a diriment impediment ». *Collectanea*, n° 1301, p. 451.

nor individual impossibility, unless, perhaps, in a case of perplexity.

Whether, and to what extent, *impossibility* of observing an invalidating law renders it inoperative, is a controverted question. The general teaching is that, *per epikeiam*, an invalidating law, as such, loses its effect in cases of *common* impossibility (2). As concerns cases of *individual* necessity, many authors absolutely deny that use can be made of *epikeia ;* while others permit the employment of it in a very urgent necessity, as we shall state in n° 378, in connection with the case of perplexity (3).

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1. As regards the special condition of the impediment of *Orders*, see below, n° 285, 1° and the note.

2. Until quite lately the classic example, for the impediment of *clandestinity*, was that in places where it was not possible to approach the parish priest or his delegate, it sufficed, for the validity of the marriage, to contract it before two witnesses. But at the present time this case has been provided for and settled universally by art. VIII of the decree *Ne Temere*. See above, n° 69.

An analogous case may occur with regard to the impediment of *disparitas cultus*, e. g., in missionary countries, when Catholics have penetrated into very remote regions far from any other Christians, and consequently can only marry with unbaptized persons, while distance makes it impossible for them to apply for a dispensation. See the decree of C. S. O., 4 June 1851, in the *Collectan.*, n° 1275 ; De Becker, *De Matr.*, p. 230 s. in note ; Collet, o. c., III, p. 58 s.

3. See, in a different sense, Van den Berghe, o. c., n° 125 ; *Collat. Brug.*, t. VII, p. 366, and t. XII, p. 458 s., and ll. cc. ; *Theol. Quartalschr.* (Lintz), 1889, p. 870.

III. Validity of a marriage contracted by one who erroneously believes himself to be under a diriment impediment.

239. *Doubt as to the existence of a diriment impediment does not affect the validity of a marriage,*

There are two possible hypotheses. 1. The person in question has only a *doubt* as to the existence of the impediment ; and then there is no reason why he should not contract *validly*, provided the impediment does not really exist, « since this doubt does not exclude the sincere, though conditional, intention of contracting marriage, in case the impediment does not really exist » (1).

nor, in some cases, certainty.

2. Or he *regards as certain* the existence of a diriment impediment. Then valid consent is possible only when he has not full knowledge of the effect of such an impediment, or when he does not advert to it at the time ; or again, if being acquainted with its effect, he, notwithstanding, seriously gives his consent at all hazards, relying on the assumption that, perhaps, the impediment will prove inoperative (2).

In practice, however, it is better to proceed to the validation of such marriages, so as to make sure.

IV. Is it permissible to contract marriage when in doubt as to a diriment impediment ?

240. *As a rule, one cannot contract marriage in doubt as to the existence of a diriment impediment.*

1. **As a general rule,** while in doubt as to the existence of a diriment impediment, *it is not permissible* to contract marriage without a preliminary dispensation, at least by way of precaution.

The *reason* of this is that the doubt affects not the lawfulness, but the *validity* of the act, and consequently the question of living in lawful wedlock or concubinage (3) ; for this reason one cannot pass from speculative to practical probability.

2. Nevertheless, this rule admits the following **exceptions :**

a/ The case of *urgent and grave necessity,* as for example where the engaged parties would otherwise be exposed to loss of reputation. This motive may be so imperative, as in the case of perplexity

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1. Theol. Mechl., o. c., nº 66, qu. 4.

2. See the solution of a similar case in Collet, o. c., III, p. 90 s.

3. We say nothing of the danger of irreverence to the sacrament through the employment of invalid matter and form, for it might be objected that the sacrament is unaffected, seeing that the matter and form exist only when the contract is valid. See above, nº 219.

that we speak of in nº 378, as to make marriage permissible even in the full certainty of an impediment.

b/ The case of *Ecclesia supplet*, that is to say, where the Church is considered to remove the impediment, as far is it exists, at the moment of the celebration of the marriage (1). According to the common opinion (2), the Church intervenes thus in a *doubt of law* as to the existence of an impediment of the *ecclesiastical* law, for which the Holy See usually grants a dispensation, or in doubt as to the validity of a dispensation from an impediment already granted (3).

c/ The case of a *doubtful* impediment *not admitting of dispensation*, which would absolutely exclude *all* marriage. Here the natural right that a man has to marry ought to prevail over the doubt, provided the rights of third parties are respected. This is the case with doubt as to absolute impotence, notwithstanding which, the marriage is not to be opposed. An exception, however, must be made with regard to the impediment of *ligamen*. In a doubt as to the death of the husband (or wife), the other party cannot be permitted to marry again, because there is then a question of respecting the probable rights of the original husband (or wife).

Note. 1. In the three cases given above, a/ b/ and c/, if time permits, the matter should be first laid before the Ordinary.

2. *After the marriage has taken place*, it must be considered as valid until its nullity has been proved.

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1. Nevertheless, in order that one may proceed to marriage in such a case, there must be some reasonable motive for doing so, for the *suppletio Ecclesiae* is only an extraordinary means for removing impediments.

2. See Gasparri, o. c., nº 254; Wernz, o. c., nº 216, note 13; Theol. Mechl., o. c., nº 66, qu. 5.

3. The Church does not supply in a doubt *of fact*, either as to the existence of an impediment, or as to the fact of dispensation, though it has the power to do so, and evidently not in a doubt as to an impediment of *divine* or *natural* law. See the answer of the C. S. O., 6 Apr. 1906, in the *Collat. Brug.*, t. XII, p. 777, and especially the decree of the C. S. O., of 9 Dec. 1874, ad 18m, in the *Collectanea*², nº 1427, and compare Gasparri, o. c., nº 255.

Further on, we shall meet with examples of doubt of ecclesiastical law especially with regard to the impediments of *legal relationship* and *crimen*; on this latter impediment, see the case theoretically and practically resolved by Pejska, *Das Rückversprechen...*, in the *Zeitschr. f. k. Th.*, 1912, p. 131 s. Cf. also below, nº 404.

3. With regard to the *use* of a marriage of doubtful validity, see above, n° 142.

V. Special malice of fornication committed by persons between whom an impediment exists.

241.

Is there a special malice in fornication committed by those between whom a diriment impediment exists?

A. *Is there a special malice?*

We must distinguish:

1. If the impediment has been established on account of some particular evil (opposed to some special virtue, or in a special way to any virtue) to which the *intercourse itself* gives rise, then the act of fornication has a special malice distinct from the sin of luxury.

Such are the impediments of consanguinity, affinity, spiritual relationship, public decency, vow, Orders, prior and existing marriage *(ligamen)*, impotency.

2. If the impediment has been established for some other motive, viz., as a punishment of sin, or on account of some evil resulting less from the intercourse itself than from the *cohabitation and community of life*, no special malice is incurred.

Such are the impediments of *crimen*, *raptus*, and *disparitas cultus*.

Does it remain after dispensation?

B. *Does this special malice remain attached to fornication after dispensation?*

In general it does. The dispensation does not efface it from the illicit intercourse. The reason is that, *in general*, the evil causing this special malice to attach to such relations is antecedent to the impediment and independent of it; consequently, it is not looked upon as being removed directly and absolutely by the dispensation that takes away the impediment. The dispensation renders legitimate the future *conjugal* relations, but not the *illicit* intercourse.

Nevertheless, a *probable* exception may be made for the impediments of *consanguinity*, *affinity*, *spiritual relationship* and *public decency*.

For, the special evil resulting from sexual intercourse between persons subject to these impediments is to a certain extent dependent on the existence of the impediment. Practically, therefore, the former may be considered as circumscribed by the limits of the latter (1), and so, when the impediment is removed, the special malice may be said to disappear.

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1. Thus when the Church shall have reduced the impediment of consanguinity to the third or, perhaps, even to the second degree, the special malice of incest

In practice, then, seeing the probability of this opinion, engaged parties, related or in affinity with one another, who have had unlawful intercourse before marriage, but only after the granting and issuing of a dispensation, are not to be considered guilty of incest ; neither do they incur the reserved case of incest (1), even if all the other conditions have been fulfilled.

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now attaching to unlawful intercourse between relations in the fourth or fifth degree will thereby disappear.

1. The *Libellus* of the diocese of Bruges declares this expressly, p. 49. The case may be a practical one in respect of engaged parties in affinity with one another in the first degree, who, having obtained a dispensation, indulge in illicit intercourse before marriage.

Section II

IMPEDIMENTS IN PARTICULAR

Preliminary notions. Classification of impediments.

242. *Enumeration of impediments : 1. canonical :*

I. The **prohibitive impediments** are eight in number : The Church's prohibition (1), omission of the banns, betrothal, vow, forbidden time, mixed religion, reasonable opposition of parents, and absence of the proper parish priest (or of his delegate) of the bride (2).

a) *prohibitive,*

The other impediments sometimes given by authors, either do not regard marriage as a contract, such as censure and the state of mortal sin, or they are common to every bilateral contract, such as doubt as to the existence of an impediment that may invalidate the contract (3).

Formerly, canon law made mention of several other prohibitive impediments. There was, for example, the impediment of *Catechism*, which was a sort of spiritual relationship (4). There were also various prohibitions that had their origin in certain *crimes :* viz., incest (5), wife murder, murder of a

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1. The Church's prohibition ordinarily constitutes only a simple prohibitive impediment, and is accordingly included here, but it may constitute a diriment impediment, should an invalidating clause be added to it by the Sovereign Pontiff.

2. Clandestinity in like manner constitutes a prohibitive impediment, under the new law *Ne Temere,* for mixed marriages contracted in Germany and Hungary. We have seen above, n° 79, that by an exceptional measure such marriages are validly contracted outside of the formalities of the decree *Ne Temere.*

3. See the definition of impediment, n° 234.

4. See the *Collat. Brug.*, t. XI, p. 33 s. and below, n° 318.

5. Cf. Esmein, o. c., I, p. 208 and 399 ; Geffcken, o. c., p. 60 s. ; Jungmann, o. c., III, p. 337 s. ; Schrörs, o. c., p. 198, s. ; Hépelé-Leclercq, o. c., IV¹, p. 238 ; Sdralek, o. c., p. 133-137, and p. 154-156 ; their teaching and the documents quoted by them show that at the time of Hincmar of Rheims, *incest* was considered by many as a *diriment* impediment, rendering the guilty parties incapable of contracting marriage with any person whatsoever. Thus the solution, given by Hincmar in the celebrated case of Lothair, becomes intelligible. He permitted him to contract a new marriage and repudiate Theutberga on condition that she

priest, attempted marriage with a nun, etc. There was also a time when the imposition of a public penance carried with it the prohibition of marriage, even after the term of the penance had expired, and notwithstanding that it had been imposed for delinquencies that were not, of themselves, a bar to marriage (1). At a later date, one of the causes that led to the successive reduction of the number of prohibitive impediments was the decree of clandestinity. See Esmein, o. c., II, p. 288 s.

The four following verses sum up the ancient discipline :

Incestus, raptus sponsatae (2), mors muliebris,
Susceptus propriae sobolis (3), mors presbyteralis,
Vel si poeniteat solemniter, aut monialem
Accipiat : prohibent haec conjugium sociandum.

II. Diriment impediments.

b) *diriment ;*

We divide these impediments into three classes, of which the *first* comprises the impediments that directly concern the *consent*, viz., error, condition, insanity (4), violence and fear, together with the abduction *(raptus)* connected with them. The *second* comprises the impediments that directly affect the *persons* and their capability, viz., age, impotency, prior marriage still existing, a solemn vow of chastity, sacred Orders, disparity of worship, consanguinity, affinity, public decency, spiritual and legal relationship, and lastly crime. The *third* class embraces only one impediment and this has a direct bearing on the *form of the contract,* viz., the

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could be proved guilty of incest in the past with her brother ; this would make her subsequent marriage with Lothair invalid.

On the question of how far the prohibition of marriage made against the incestuous has been preserved in the present law, see nos 139 and 304.

1. Cf. Esmein, o. c., I, p. 398 s.

2. To the ravisher of the wife or betrothed of another, marriage with any person whatever was forbidden, in punishment of the crime. Cap. 34, C. XXVII, 2. See below, nos 269 and 272.

3. This concerns the crime of one who, of malice, took upon himself to be the godfather of his own child, for the purpose of depriving himself of the right to demand conjugal relations. All marriage was forbidden him, even after the dissolution of the former. See above, no 140.

4. Error and insanity do not, properly speaking, constitute a special impediment to marriage, as we have observed above in no 234, since they are impediments common to every contract, and consequently are not, from our point of view, impediments strictly so called ; it is nevertheless fitting to speak of them here, as they afford an opportunity for some useful observations.

impediment of clandestinity of which we have already spoken in dealing with the formalities of consent (1).

Note. I. In certain respects, especially as regards the impediments, both prohibitive and diriment, the marriage laws are likely to undergo modification : see, on this subject, the *Postulata Episcoporum* at the Vatican Council, in the *Canon. contemp.* 1906, *passim*, according to VILLIEN ; and also the *N. R. th.* XV p. 480 s. Important changes will, one hopes, be introduced in the new codification of canon law (2) ; we have already noticed the modifications made as regards the impediment of clandestinity by the decree *Ne Temere* of 2 Aug. 1907. For those of consanguinity and affinity, see later, n^os^ 301 and 307.

II. Impediments of the Civil Law.

243. 2. *civil impediments :*

It will be of use to indicate here the impediments established by the civil Code of Belgium as regards civil marriage : we must take them into account in judging of the validity of marriages between unbelievers (3) ; and it is useful also to bear them in mind in dealing with marriages between Catholics, in order to avoid difficulties and conflicts with the secular power.

We give, therefore, a list of civil impediments, both diriment and prohibitive, although in the civil Code the distinction between the two kinds is not very clearly drawn (5).

We must note that, among the diriment impediments from the civil point of view, some render the marriage non-existent, others render it null (4).

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1. The diriment impediments are expressed in the following verses :

Error, conditio, votum, cognatio, crimen,
Cultus disparitas, vis, ordo, ligamen, honestas ;
Amens, affinis, si clandestinus et impos.
Si mulier sit rapta, loco nec reddita tuto,
Impubes, ni forte potentia suppleat annos ;
Haec socianda vetant connubia, facta retractant.

These impediments are eighteen in number : the reader should notice that in these verses *cognatio* is intended to include, not only consanguinity, but also spiritual and legal relationship.

2. On this codification and the various documents bearing on it see *Collat. Brug.* t. XIII, p. 335 ss. and p. 452 ss.

3. See above n° 224 ; WERNZ, o. c., IV, 219 ; DE BECKER, *De Matr.* p. 40 and note 3.

4. See BOUDINHON, *Rev. du clergé français*, t. 47 (1906) p. 419 s.

5. The *nature of a null act* is not clearly defined in the civil code of Belgium and this point gives room for much discussion.

Many writers divide null acts into *non-existent* acts, the nullity of which is not

A. Diriment Impediments.

1. Those that render the marriage *non-existent* are identity of sex, want of consent (art. 146) (1) and the neglect to celebrate the marriage before the civil official (2). a) *diriment*,

2. The following render marriage *null* in the sense indicated above :

a/ Want of liberty in the consent ; a. 180 and 1112-1113 ;

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matter for a judicial decision, but only for a declaration, and acts ***null or annullable***, the nullity of which depends on the act of the judge *annulling*. Among these latter some are nullified with an *absolute* nullity, others with a *relative* nullity, according as the right to take action in nullity pertains to all or only to certain determined persons. See *Collat. Brug.*, t. IX, p. 275. Other writers, on the contrary, putting aside the division into non-existent and null acts, divide them rather into *null* acts — and these they call null « *de plein droit* » or absolutely — and *annullable* acts ; they put among the first all acts that are null with *absolute* nullity and in their opinion the judge does not nullify these, but simply declares them void ; while among the second they count acts null with *relative* nullity. See PLANIOL, o. c., I, 326-349.

Whatever controversy there may be on the nature of null acts in general, one must, we think, admit, at least as regards marriage, in the minds of those who drew up the Code Napoléon, the distinction between non-existent and null acts, according to the first opinion. Thus :

a/ A civil marriage is considered *non-existent* when it lacks some essential element demanded either by the natural law or by the positive law.

b/ It is considered *null or annullable*, in such a way as to exist juridically until anulled by the judge, when it possesses, indeed, all the essential elements desired, but lacks some condition required for the validity of the act, so that it is tainted with a defect which can cause its annulment. Now, a marriage null in this sense, is null either with absolute or with relative nullity, according as the public minister or anybody who may have any interest whatever in the matter can take action against it, or the right to take action belongs only to certain specified persons (art. 180 and 182 ; PLANIOL, o. c., I, nos 1031-1044 and 1866). See on this subject PLANIOL, o.c., I, nos 1045, 1089, 1046 s., where he criticises the conception of the legislator as to the nature of a null marriage. See also HOLLWECK, o.c., p. 186 ss. ; SCHAUB, o. c., p. 32 s. and ENGLMANN, o. c., p. 332-339, on the dispositions of the German code ; this does not admit the division between non-existent and null marriages, but distinguishes a double action in nullity : *Nichtigkeitsklage* and *Anfechtungsklage ;* this distinction corresponds fairly well to that between marriages null with absolute nullity and those null with relative nullity.

1. « There is no marriage where there is no consent, » that is to say « an absolute absence of consent and not merely the existence of a vitiated consent...which renders the marriage simply annullable ». PLANIOL, o. c., I, 1009 ; VAN HEMEL, o. c., p. 12 s.

2. See above, n. 83.

b/ Error (as regards the person) ; a. 150 and 1112-1115 ;

c/ Want of consent on the part of the parents or grand-parents, as we shall see further on, n° 250 ;

d/ Want of required age (18 years for men and 15 for women) ; art 144;

e/ The existence of another marriage *civilly valid* ; a. 147 ;

f/ Want of publicity in the celebration of the marriage ; a.165 and 191 (1);

g/ The absence of a *competent* civil officer ; a. 165 and 191 (2);

h/ Consanguinity in the direct line to all the degrees, and in the collateral line in the first degree and the first mixed with the second or third (counting the degrees as in canon law) ; a. 161-163 with the note. In the direct line and for the first degree in the collateral line, the impediment applies also to illegitimate consanguinity ;

i/ Affinity in the same degrees, except the second and third mixed with the first ; *ibidem*.

b) *prohibitive*. B. The **prohibitive impediments** are as follows :

a/ To have omitted to consult the parents, in the cases given below, n° 250.

b/ The omission of the publication of the banns and of the delay required by law, according to what has already been said n° 46 (3).

c/ Opposition in the legal forms ; see above n° 46.

d/ A widow is prohibited to marry again within ten months of her husband's death ; art. 228 (4).

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1. See above, n. 83.

2. The public officer may be *incompetent* either because he has not the required qualities, as happened in 1909 to a sheriff of Liège, who was not a Belgian ; or because he is acting beyond the limits of his jurisdiction with regard to those making the contract, of whom he is not the *proper* officer (see above n° 83). Planiol, o.c., I, 1025 s., remarks that the judge enjoys great latitude in pronouncing nullity under this head. See also Van Hemel, o, c., p. 27 ss.

Let us add that the new German code recognises the principle in force in canon law (see above n° 64), and counts as valid a marriage celebrated before the *putative* civil official, that is to say, one who publicly fulfils the functions and is generally regarded as legitimate (art. 1319). See Crétinon, l. c., p. 162 s. Some authors have tried to apply the same principle to the Code Napoléon, though they cannot quote any text of the law in support of their thesis ; they rely on the legal dictum, « error communis facit jus ».

3. Cf. art. 192 in connection with Planiol, o. c., I, 1020.

4. It would be reasonable to extend this prohibition to the case where a marriage contracted has been declared null. See Carteron, o. c., p. 15 s. ; and Esmein. o. c., I, p. 401 s, who observes that in *canon law* no prohibition of this kind exists.It was otherwise at one time,but only during a short period : a widow

e/ There are certain delays and conditions to be observed before contracting a new marriage after divorce ; a. 296, 297. See above, n° 207. Cf. VAN HEMEL, o. c., p. 24 ss.

f/ There are certain special prohibitions in the case of soldiers marrying ; these are dealt with at the end of art. 75 of the civil code (1).

Note. 1. The impediments which render a marriage null with *absolute nullity* are those given under A, after the letters d, e, f, g, h, and i ; those enumerated under a, b, and c, render a marriage null with *relative nullity :* that is to say, the action in nullity cannot be brought on the plea of error or of violence, except by that one of the contracting parties whose consent was not free ; and in the case of absence of parental consent, it can only be brought by the party under age, and by the person whose consent was required (a. 182).

2. A marriage which has been declared null by judicial sentence, is deprived of all efficacy, and that *with retrospective effect*, so that it is considered never to have existed (2).

The case is excepted, where the marriage declared null was *putative*, that is to say, contracted in good faith. In this case, all the effects which may have followed the marriage up to the moment of annulment, are held valid, even after the sentence of nullity. If, however, the good faith has existed

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could not marry again within a year or ten months of her first husband's death.

The law demands no delay before marrying again on the part of a *widower*. Recently, however, the practice has been introduced by the minister Van den Heuvel of not dispensing a widower from the impediment of affinity, for example, except on the condition that he waits six months before remarrying. The essential and principle motive for this prohibition against the widow is to avoid confusion of parentage (confusio partus) ; but there is another motive telling in the same direction : it is unbecoming to contract a second marriage at once ; hence the prohibition stands even when the woman has been brought to bed before the expiration of the tenth month. See CASTAN, o.c., p. 31 s. ; *Conférences de Paris*, III, p. 92. The German law directs otherwise : according to art. 1313, the impediment ceases in this latter case.

1. As regards the prohibitions in force in the case of *legal relationship arising from adoption* (a. 348), and in that of divorce (art. 288 and the old art. 295), jurists discuss the question as to whether these are diriment or simply prohibitive. We incline to the first opinion, although in jurisprudence the opposite is commonly adopted on account of the silence of chap. IV, Title V. It is commonly supposed that this title enumerates all the reasons for nullity, but, as a fact, it determines rather the persons to whom it belongs to take action in nullity. See PLANIOL, o. c., I. nos 994-997 and 1114.

2. PLANIOL, o.c., I, n° 1092 gives the consequences of nullity from the civil point of view.

only on the part of *one of the parties*, « the marriage produces its civil effects only in favour of that party and of the issue of the marriage » (a. 202). PLANIOL, o. c., I, n° 1112 s.

3. The consequences of nullity in an annullable marriage can disappear spontaneously in certain cases, by a sort of *revalidation* of the marriage itself, so that it can no longer be attacked. Thus, in default of age or of puberty, it suffices for the revalidation of the marriage, that six months shall have elapsed since the parties have attained the proper age (a. 285). In the cases of *error* and *violence* it is sufficient for there to have been « continued cohabitation for six months after the party has acquired full liberty and recognised the error » (a. 181). In default of consent on the part of the parents etc., art. 183 rules that « no action in nullity can be taken either by the parties themselves or by the relatives whose consent was required, whenever the marriage has been approved expressly or tacitly by those whose consent was necessary, or when a year has passed, from the time they knew of the marriage, without any claim being made on their part. Nor can any action be taken by the husband, when a year has been allowed to elapse without action on his part after he has attained the age sufficient for his own consent to the marriage to be valid » (1).

4. The king can grant dispensations from the impediment of age (a. 145), from affinity in the collateral line, and from consanguinity in the collateral line, beyond the first degree (2); the king's proctor can dispense from the banns and from the delay required by law ; see n° 46.

5. As regards the marriages of foreigners, several agreements were made

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1. Art. 196 says : « When there is *possession d'état* and the act of celebration of the marriage before the civil officer has taken place, the married parties are respectively incapable of demanding the nullity of this act ». But this provision is not a means of *revalidating* the marriage, since the action in nullity is not *absolutely* done away with, but only forbidden to the married parties.

As regards the second part of art. 185, which declares that want of age is no longer an obstacle to the *validity* of a marriage, « when the woman, who had not reached the age, has conceived before the lapse of six months » : it is not a question there of *revalidation*, but rather of a restriction of the impediment of age, in the sense that the law does not annul the marriage, as is the case in canon law when precocity supplies the defect of age : her having conceived is a sign of this. See further on, n° 275.

2. By art. 164, a dispensation from consanguinity between uncle and niece, aunt and nephew can be obtained. By the law of April 23, 1827 and Feb. 28, 1831, a dispensation can be obtained from affinity in the collateral line, provided that the first marriage has been dissolved by the natural death of the other partner.

between different countries at the Hague Conference. The terms of them can be found in the *Arch. f. k. Kirchenrecht*, 1906, pp. 465-485 (1).

The fundamental principles of international law admitted are : 1. As a general rule, *the right and permission to contract marriage* (the *capability* of those interested) are regulated by the law of the countries of the several parties ; 2. the *formalities of the contract* are regulated by the law of the country where the marriage takes place (locus regit actum) (2). See Orescu, o. c., especially pp. 185-190 and 369-383 ; Bouscholte, o. c., p. 3 and p. 9 s.; the latter gives the text of the agreement. Compare also what we said above, n° 83.

Chapter I.

PROHIBITIVE IMPEDIMENTS.

Of the eight prohibitive impediments already enumerated, we have to treat of the following only : Ecclesiastical prohibition, forbidden times, simple vows, want of consent on the part of the parents, and mixed religion. Those which have to do with neglect of the publication of the banns and with betrothal have

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1. Convention of the 12th of June, 1902, sanctioned by the Belgian law of the 27th of June, 1904. *Moniteur* of 10 July, 1904.

2. Thus a marriage between two Spanish Catholics, cannot be validly celebrated in Belgium — as regards the civil law — before the Catholic parish priest, even though in Spain the law holds such union valid. Such a marriage must be contracted, in conformity with the Belgian law, before the civil officer and two witnesses.

This principle, however, admits of a *twofold derogation* :

a/ that marriage canonically celebrated between two Spanish Catholics, in conformity with the law of Spain, may be recognised as valid in other countries, as provided by art. 7 of the Convention : « A marriage null, as regards formalities, in the country where it was celebrated, may nevertheless be considered valid in other countries, if the formalities prescribed by the law of the countries of the respective parties have been observed » (See the decision of the tribunal of Antwerp, of 9 March, 1911, in the *Pasicrisie*, 1911. III, p. 180 s.).

b/ A marriage between the same celebrated in Belgium, according to the formalities of the Belgian law, may be repudiated as invalid before the Spanish law, in accordance with the provision of art. 5, paragr. 2, of the said Convention : « It is nevertheless to be understood that those countries, whose legislation requires a religious celebration, may refuse to recognise as valid marriages contracted abroad by their nationals without the observance of this requirement ».

been dealt with in the treatise on betrothment ; that arising from the absence of parish priest of the bride has been explained already in dealing with the formalities of consent.

Article 1. Ecclesiastical Prohibition.

244. *Ecclesiastical prohibition means the prohibition of the marriage in a particular case,*

Ecclesiastical prohibition consists in the prohibition to contract marriage *in a particular case,* while the other impediments are all in the form of a general law. Hence this prohibition is said to be *ab homine,* not *a jure*. It does not ordinarily constitute more than a simple prohibition ; but the Sovereign Pontiff could annex to it an invalidating clause, so as to make it a diriment impediment.

The *causes* which ordinarily bring the impediment into operation, are : a suspicion of the existence of some other impediment (1) ; the opposition of a third person, for instance, on the score of betrothment ; and the fear of causing a scandal. In these cases, the prohibition is said to be made *in conformity with the law*, because the foundation on which it rests, is based on the common law ; it still, however, constitutes an impediment in itself, because the prohibition is real and binds the parties concerned, even if they on their part are certain that the suspected impediment does not exist.

on the part of the Pope or the Bishop.

The *Sovereign Pontiff* alone has full power to issue this special prohibition, without respect to the limits of the common law and its provisions ; he can, as has been said, prohibit the marriage and even prevent it by an invalidating clause.

The *Bishop* can issue a prohibition, even judicially and with penal sanction, but it must be purely as a prohibition and in strict conformity with the law, for, he has over marriage merely a judicial, not a legislative power, and to make a new impediment beyond the limits of existing law would be to exercise a legislative power.

The *parish priest* also can issue a prohibition, purely such and in conformity with the law ; but it must be *in a provisional and non-*

1. For example, as we said above (nº 186), in the case of the dissolution of a marriage, contracted but not consummated : when the suspected impotence of one of the parties is the cause, a clause is added, of a purely prohibitive nature, which forbids « passing to another marriage without having consulted the Holy See ».

judicial manner, and until the Bishop shall have pronounced judgment on the case : for, a priest has not even judicial power over marriage.

Note. In *civil law*, *legal opposition* made by a competent person, constitutes a true prohibitive impediment: in fact such opposition has, for the state official, the effect of fully preventing him from proceeding with the marriage, until it has been removed by the sentence of the judge. See above, n° 46.

It is not so in canon law. In canon law, the parish priest can, on being notified of the opposition of a competent person, proceed with the marriage, even without waiting for a judicial sentence, provided that he sees clearly that the opposition is not founded on the existence of a true canonical impediment. One must, however, except the case where the judge, to whom the case has been taken, has issued a prohibition against any further procedure. See above, n° 33 s. CORBET, o. c., pp. 30-35, gives the discipline formerly in force.

ARTICLE 2. Forbidden times.

A. *Impediment* by common law.

245. *During the prohibited times.*

« The Holy Synod commands that all observe the ancient prohibition against *solemnizing* marriages from (the first Sunday of) Advent till the feast of the Epiphany, and from Ash Wednesday till the octave of Easter inclusively ». *Conc. Trid.*, Sess. XXIV., ch. 10, *De Ref. Matr.*

the solemnities of marriage are forbidden by the common law

The *common law* of the Church, therefore, forbids, during the prohibited time, not the contract of marriage itself, but only the solemnities that usually accompany it, that is to say, the solemn nuptial blessing, the escorting of the bride to her new home (1), and the nuptial feast, as the Roman Ritual expressly says (2).

By the solemn blessing must be understood not that prescribed by the ritual after the priest's interrogation of the parties to obtain their mutual consent, but the *nuptial blessing properly so-called*, inserted in the mass *pro sponso et sponsa* (3) : the celebration of this

1. Decree S. C. de Prop. Fide, July 21, 1841, 1°; *Collectan.*, n. 1551.

2. The solemn escorting of the bride used at one time to be one of the principal solemnities (see above n° 122) ; the custom has now disappeared.

3. Tit. VII, ch. I, n. 18 : « Finally let parish priests remember that from the first Sunday of Advent... the *solemnities* of marriage are forbidden, such as the nuptial blessing, the escorting of the bride, the celebration of the nuptial feast. But the *marriage* can be contracted at any time ».

mass being also forbidden. As regards the wedding festivities, the prohibition is not considered to exclude a moderate and seemly repast, according to the custom of the country.

As to the days on which the prohibited seasons begin and end, these are civil days counted from midnight to midnight.

The reasons for this prohibition are that these seasons are in a particular manner consecrated to penance (this applies specially to Lent and Advent); and also that worldly rejoicings, such as generally accompany the solemnization of marriage, are an obstacle to the frequentation of the Sacraments and to spiritual joy; (this second applies to Easter week, Christmas and the days following till the Epiphany) (1).

and the marriage itself sometimes by particular law.

B. Impediment by particular law.

In some dioceses, the *matrimonial contract* itself is forbidden (2).

This rule is in force at Rome, according to the *Instructions du Vicariat*, l. c., p. 613.

This prohibition, over and above the common law, is made possible by an exactment of the Council of Trent, Sess. XXIV, ch. 1, *De Ref. Matr.*, in virtue of which, « if in some places there exist other praiseworthy customs and ceremonies in this matter, besides those already mentioned, the Holy Synod earnestly wishes these to be by all means retained » (3).

The Bishop can dispense as regards local law.

C. The Holy See can **dispens**e here from the impediment from *common law*, although there are seldom present motives of sufficient gravity. The *Bishop* can dispense from that arising from *local law*, that is to say, he can permit the matrimonial contract to take place without the nuptial solemnities (4).

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1. The Council of Trent, Sess. XXIV, can. 11, pronounces anathema against those who say that « the prohibition of the solemnities of marriage at certain times of the year is a tyrannical superstition, having its origin in pagan superstition ».

2. Notably in the diocese of Bruges. « As regards the prohibited times », says the *Liber Manualis* p. 189 s., « the common law forbids only the solemnities of marriages, but the custom among us, from which no one by his own authority may consider himself exempt, rules that during those times the matrimonial contract itself is considered forbidden ».

3. The decree of Propaganda of 1841, cited above, also supposes the lawfulness of this special prohibition.

4. In the diocese of Bruges, the *deans* can also by delegation grant dispensation from the impediment made by the local law. See *Stat. diœc.*, P. I, Tit. II, art.

246.

Note. 1. During the prohibited seasons, no enactment of law forbids either betrothal or the publication of banns. *Practical remarks.*

2. According to the decree of the Holy Office, 31 Aug. 1881, when by reason of this impediment the nuptial blessing has not been received, the parties concerned must be invited to ask for it as soon as possible after (1).

3. It is well to warn the faithful of the prohibition of marriages during the forbidden times (2).

Scholion. *In times past,* in some places at least, the forbidden times included, besides those periods mentioned above, from Septuagesima to Lent, and the three weeks between the Rogation days (including these) and the first Sunday after Pentecost, or, after another way of reckoning, the three weeks preceding the feast of S. John the Baptist (3). *Ancient discipline.*

6, n. 5, where it is also added that « if the parties to be married are from different deaneries, dispensation must be asked from the bride's dean only ; such dispensation must be entered in the register ». The fee is 1 fr. 50. As to the solemnities, the *Liber Manualis* of the same diocese says, p. 190 : « If, by dispensation, a marriage is permitted during these times, it is by no means allowed to say the mass *pro sponso et sponsa*, nor to give the blessings that occur therein ».

The Bishop of Bruges goes even further, and decrees that « whenever a dispensation is granted for a marriage during the forbidden times, not only is the solemn blessing during the mass forbidden, but also, to conform the more to the mind of the Church, all pomp is to be absent from the marriage, such as the use of carpet, and all particular solemnity in the playing of the organ and ringing of the bells ». *Liber Man.*, p. 190.

1. See above, n. 119.

2. « To avoid the celebration of marriages during the prohibited times, we desire parish priests, about six weeks before these seasons, to warn the faithful at all the masses, and to invite those who wish to get married without delay, to do so before the time, and the others to wait till after ». *Liber manualis* of the diocese of Bruges, l. c.

3. See chap. 4. X, II. 9 ; MARTÈNE, o. c., P. 2, l. 1, ch. IX, art. 2, p. 602 s. Cf. also *York Manual,* p. 25, and *Sarum Manual,* p. 24*, in note, where the following verses are quoted :

« Aspiciens, veterem, circum, qua, quis, benedicta,
Tempora post ista fiet copulatio sacra ».

That is to say, the solemnization of marriage is forbidden 1/ from the first Sunday of Advent *(Aspiciens)* to the octave of the Epiphany (on which is said at lauds, *Veterem hominem) ; 2/* from Septuagesima (when *Circumdederunt* is sung) to Low Sunday *(Quasi modo geniti)* ; 3/ from Rogation Day (when the gospel *Quis vestrum* is read) to the octave of Pentecost, i. e., Trinity Sunday (when the Mass *Benedicta sit* is said).

The common law forbids only the *solemnities of marriage* and not the contract itself, though the reasons given would seem to be equally against this latter.

This anomaly is to be explained as follows : formerly marriage was contracted first *in private* without solemnities or even cohabitation ; later, the marriage was solemnly celebrated before the Church, with the mass *pro sponso et sponsa*, the nuptial blessing and the escorting of the bride home ; it was only after these solemnities that cohabitation and the consummation of the marriage took place. Thus one easily understands how only the solemnities were *then* forbidden during prohibited times, and not the contract. See above, n° 122 (note) and VILLIEN, *Canoniste Contemp.*, 1906, p. 316 ss. (1).

ARTICLE 3. Simple Vows.

247. *Simple vows ordinarily render marriage unlawful.*

Law in force. *A vow to observe celibacy constitutes a prohibitive impediment to marriage ; the same is true, as a rule, of a simple vow of chastity* (2), *of a vow of virginity, a vow to enter a religious order (whether one strictly so called or not), or to receive sacred Orders.*

Explanation.

It is evident that a vow to observe celibacy makes marriage *absolutely* unlawful. Neither is it difficult to see that, *as a rule*, marriage is also forbidden to persons who are bound by any one of the other four vows mentioned ; for, the keeping of these vows is ordinarily incompatible with the marriage state.

We say : « *as a rule* » : for, in a quite exceptional case and for a very grave motive, as, for example to legitimise a child, marriage might be permissible notwithstanding a vow of chastity or virginity, or one to enter Religion or to receive Orders. But even then, the consent of the other party would be needed, so as not to injure his or her rights, and moreover, there would have to be an assurance that the vow would be kept (3).

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1. This distinction between marriage contracted by private consent, and the solemnization of marriage, is expressly mentioned in the *Salisbury Manual*, p. 51 and in the *Sarum Manual*, p. 17*.

(2) A *solemn* vow of chastity, as we have already said (n° 136), and as we shall explain later on (n° 284), constitutes a *diriment* impediment ; so also does the simple vow of chastity taken by scholastics of the Society of Jesus, after a novitiate of two years. In the present article we are not considering these cases.

(3) The mere *intention* to enter Religion before the marriage is consummated is not sufficient ; there must be, besides, a grave and pressing motive, and in

Note. We have already stated (n° 136) the obligations that would lie on a person who had contracted marriage in infringement of one of these vows.

Article 4. Want of consent of the parents.

Law in force.

248. *Dissent constitutes ordinarily a prohibitive impediment.*

The dissent of the parents constitutes ordinarily a prohibitive, but not a diriment impediment of marriage.

The *proof* of our assertion is found ch. I, *De Reformatione Matrimonii*, Sess.XXIV, where the Council of Trent says expressly that marriages contracted without the consent of parents are *valid* but *illicit* (1).

This prohibition comes from the *very principles of the natural law*. This condemns a marriage contracted without the approbation, still more, if it be in spite of the dissent of the parents, since the honour and submission due to these, demands that their consent shall be asked for in an affair of so great importance, and still more, that the children shall not conclude the matter contrary to their will. We may add that the very inexperience of the children should lead them to consult their parents, who have had experience in the matter.

We say : « *ordinarily* », because there may be exceptional circumstances when a marriage would be lawful without first obtaining consent (or even in spite of its formal refusal), for instance :

a/ When, by reason of too great distance, it is *impossible* to ask it in time.

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addition,the rights of the other party must be intact and there must be sufficient guarantees that the vow will be kept.

Ordinarily one could not permit a marriage on the part of two persons bound on either side by a vow of chastity, who, with knowledge of their respective vows, made it a condition to observe chastity. Such a marriage would be full of dangers and could only be allowed under exceptional circumstances.

(1) « The Holy Synod pronounces anathema... against those who falsely hold that marriages contracted by young people without the consent of their parents are null and void, and that the parents can validate or annul them at their pleasure ; nevertheless the Holy Church,for very good reasons, has always deteste dand forbidden such unions ». See also *Cat. Conc. Trid.*, P. II, ch. VIII, § 32.

b/ If the parents, duly asked by the children, were to refuse to give their consent *without just reason* (1).

Duties of the Parish Priest.

249. *A parish priest's duties in this matter.*

1. He will impress upon children generally to contract neither betrothal nor marriage without consulting their parents ; and if these make opposition for just reasons, he will do his best to turn the young people from their project.

2. When children who wish to get married, complain of the unjust opposition of their parents, he will not believe them too lightly, for, they are often mistaken and blinded by passion : he will rather examine all the circumstances seriously.

3. If he discovers that the opposition is in truth unjustifiable, he will do his best with prudence to bring the parents to give their consent, and meanwhile will exhort the young people to have respect and patience.

4. If the parents obstinately maintain their opposition and still the young people refuse to desist, he will refer the matter to the judgment of the Bishop ; he might, on the other hand, dispense with having such recourse where the opposition of the parents is evidently unreasonable, and, on the other hand, the formalities demanded by the civil law have already been observed (2).

We add this condition as to the civil formalities, to avoid bringing the priest into conflict with the law. As we have said before, no priest may expose himself to this, save for a very grave reason and only after consultation with the Bishop.

See on this subject *Collat. Brug.*, t. VI, p. 498, with the passages there cited ; *Rev. eccl. de Liège*, 1907, t. III, p. 100 s. ; *Ned. Kath. Stemmen*, 1905, p. 279 s.

Scholion I. Historical notice.

250. *Historical notice.*

Before the twelfth century, in countries subject to the Roman law, the

1. « The motives (of parents) are most often : that the marriage would cause great dishonour to the family, or would bring scandal, dissensions or other grave evils; that the child wishes to marry a person unworthy or unfit, e.g. of ill fame, or badly conducted, or of too low a social position, or of very weak health, or incapable of undertaking the management of a house, or (above all) of bringing up children decently and in Christian manner ». THEOL. MECHL., o. c., n. 10, qu. 5.

2. There is no necessity even to have recourse to the Bishop, when it is clearly impossible to ask the consent of the parents.

Church adopted the provisions of that law (1), as to the necessity of paternal consent for the *validity* of the marriage of a son who was not *sui juris* (2). In other countries, subject to the Germanic law, the Church required the consent of the parents for the marriage of a *daughter*, at first for the *licitness* of the marriage only (3), and subsequently for its *validity*, at least partially and equivalently, inasmuch as it declared *abduction* and *seduction*, i. e., the carrying off of the daughter against the will of her parents, a diriment impediment (4).

From the end of the twelfth century, principally under the influence of the University of Paris, the Church began to regard as lawful and valid marriage contracted by the sole consent of the parties, notwithstanding the opposition of the parents, as is clearly established by Lucius III (1181-1185), and Innocent III (1198-1216) : ch. 6 and 7, X, V, 17. See also what we say below in n° 272.

This question was very much discussed at the *Council of Trent*, in connection with the decree on clandestinity (5).

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1. BERNARD, o. c., p. 10-46, explains very well the provisions of the Roman law on the power of the father of the family, especially with regard to marriage. See likwise KÖSTLER, o. c., p. 11 s. It is true that ch. 2, C. XXVII, 2, says that the sole consent of the contracting parties suffices for the existence of the marriage; but these words have reference to the constituent elements of the contract, and their meaning is that the sole consent of the parties concerned, to the exclusion of the copula, is sufficient for the completing of the marriage. They settle nothing as to the requisite preliminary conditions, especially that of parental consent. Thus in the Roman law also we meet with analogous psssages, though, in that, paternal dissent was indisputably an impediment to the marriage of children. But with regard to the later interpreters of the chapter, it is obvious that they explained it as far as possible in conformity with the law existing in their own times, when, with the effective extension of matrimonial jurisdiction of the Church, canonical legislation had rejected the Roman law in this matter.

2. KÖSTLER, o. c., pp. 68-76, upholds this against VANTROYS, o, c., p. 170 ss. and SCHULTE, o, c., p. 320 s. GILLMANN, however, does not agree with him, *Archiv. f. k. Kirchenr.*, 1911, p. 375, and especially, 1912, p. 193 s., where he appeals to c. 2, C. XXVII, 2, and also to various decretists who have interpreted that chapter.

3. According to the Germanic law, the absence of parental consent did not render the marriage null, but only illicit and less legitimate. See KÖSTLER, o. c., p. 21 s. ; BERNARD, o. c., p. 47-73.

4. See below, n° 272. On the question whether this discipline, requiring parental consent for the validity of the marriage, at least of a daughter, was extended by a *general law* to the whole Church, see BERNARD, o. c., p. 75 s. ; ESMEIN, o. c., I, p. 153 s. ; WERNZ, o. c., n° 334.

5. At the time of the Council of Trent, there existed a stirring of opinion in

They successively proposed, under three different forms, a canon requiring the consent of parents for the validity of the marriage (and also of the betrothment) of their children below a certain age (1); but in none of these forms did the canon secure the assent of the Fathers,so that the marriage of children remained valid notwithstanding the dissent of their parents. See in LAFOURCADE, o. c., p. 186, the considerations that influenced the Fathers of the Council.

As to the Gallican laws and ordinances, which, by an abuse and by indirect means, made the absence of paternal consent a *diriment* impediment, as if marriage under such conditions constituted rape, and became null on this ground, see BERNARD, o. c., p. 106-147, as well as the note to n° 22 (2).

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favour of the nullity of marriage contracted against the will of parents. This movement arose principally from a reaction in favour of the Roman law; and the King of France went so far as to urge the Council to make a canon in this sense. Cf. BERNARD, o. c., p. 93 s. See also above, n° 93, the connection between the question of clandestinity and that of parental consent.

1. In its *first* form, the proposed canon decreed : « By this present decree, the Holy Council renders henceforth *null* and *invalid* the marriage of *young men* before they have completed their *eighteenth* year, and of girls before they have completed their *sixteenth* year, contracted *without the consent of their parents* ».

In its second form the canon reads : «If young men before they have completed their *twentieth* year, and *girls* before they have completed their *eighteenth* year, *without the consent of their parents,* attempt henceforth to contract marriage or betrothment,the Holy Council renders them incapable of contracting the one and the other, and declares *such a contract null and invalid,* unless, after having asked their parents, by themselves or by others, to consent to the marriage that they honourably desire, these refuse their consent unjustly (of which the Ordinary shall be the judge), and unless the intending parties have *contracted with the permission of the same Ordinary* ».

In its *third* form, the canon was the same as in its second, with the exception that it required the consent *of the father or of the Catholic paternal grandfather,* and reduced the age to 18 and 16 years repectively. See on this subject ESMEIN, o. c., II, p. 155-168, and especially BERNARD, o.c., p. 90-105 ; and KÖSTLER, o.c., p. 155 s.

2. In the marriages of minors, the absence of parental consent entailed, in the eyes of the civil authority, the presumption, and (according to POTHIER, o. c., p. 123 s. and others) the inevitable *(juris et de jure)* presumption of rape, that is to say, rape by *seduction,* and on this ground constituted a diriment impediment of marriage. But the civil law was wrong on this point, for : a/ even if the presumption were well founded, an invalidating force is recognised only in rape *by violence* (see below, n° 270, and compare with VANTROYS, o. c.,

Fuller details of the evolution of all this part of ecclesiastical discipline may be found in KÖSTLER, o. c., p. 68-161, or in the résumé that he gives on page 162 s.

Scholion II. Provisions of the (Belgian) Civil Law (1).

Provisions of the Belgian civil law.

I. AS TO LEGITIMATE CHILDREN :

A. *Under the age of 21 years complete :*

1. A son or daughter cannot contract valid civil marriage (2) without the consent of the father and mother ; art. 748 ; nevertheless :

a/ in case of the mother's dissent, the consent of the father is sufficient ; *ibid.* ;

b/ if one of the two is dead, or incapable of manifesting his (her) will, or absent, the consent of the other suffices ; art. 149.

2. If the father and mother are dead, or if both of them are incapable of manifesting their will, or if both are absent, the grandfathers and grandmothers take their place ; art 150 ; and again :

a/ if there is disagreement between the grandfather and the grandmother of the same line (paternal or maternal), and the grandmother refuses her consent, the consent of the grandfather is sufficient ; *ibid.* ;

b/ if there is disagreement between the two lines, this will be taken as equivalent to consent ; *ibid.*

3. Should there be neither father nor mother, neither grandfathers nor grandmothers (and, it would seem, neither great-grandfathers nor great-grandmothers), or should they be incapable of manifesting their will, or absent, the consent of the family council must be obtained ; art. 160.

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p. 237 s.) ; and b/ the absence of parental consent does not necessarily constitute rape by seduction, even in the case of minors.

1. We indicate here only the principal provisions of the Belgian Code, according to the law of 30 Apr. 1896 ; for the rest, see *Collat. Brug.*, t. VI, p. 188 s. ; and t. XIII, p. 386 s., where we explain certain modifications introduced by the law of 7 Jan. 1908. Cf. also the *Compte-Rendu* of the Society of St. Francis Regis, 1883-1892 and 1893-1900, where the Belgian laws, successively passed in this matter, are explained and illustrated with commentaries and various documents, together with an indication of the principal modifications introduced in other countries. See also MECHELINCK and SERVAIS, *Les Codes*, art. 148-160, where will be found in a note the provisions of the Belgian civil law before 1896 ; BERNARD, o. c., p. 228 s. ; *Revue Cathol. de Droit*, 1907-1908, p. 341 s., where it is proposed to introduce new modifications, notably to empower minors to appeal to the judge against the unreasonable opposition of their parents.

2. The absence of the prescribed consent does not render the civil marriage ***inexistent***, but ***null***, in the sense admitted by the civil law. See above, nº 243.

B. *Over the age of 21 years complete* :

1. There is no longer need of *consent*, but they are bound (1) to ask, by a respectful and formal act, *the advice of their father and mother ;* art. 151.

2. If the parents are incapable of manifesting their will, the son and daughter are no longer bound to anything ; *ibid.*

3. In the absence of consent after the act of respect, the celebration of the marriage may be proceeded with *one monih later* (2).

Nevertheless, if the son or the daugther has not attained the age of 25 years complete, the father, and, in default of the father, the mother, may, in the fifteen days that follow the notification, appeal against it (3).

4. The act of respect is not required of intending parties in indigent circumstances, whose parents have no known place of abode in Belgium ; the marriage can be celebrated *one month after* legal notification of this absence ; art. 153.

II. As to natural children :

A. *Acknowledged.*

1. *Under the age of 21 years*, they must obtain the *consent of their*

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1. The omission of the act of respect before marriage, renders the civil contract merely *illicit.*

2. Art. 152. « It goes without saying, that, when the consent of the *father* has been obtained by one of full age, the celebration of the marriage can be *immediately* proceeded with, without waiting for the expiry of a month from the time of the notification of the act of respect to the *mother* ». Report of the special commission of the Chamber of Representatives — *Documents Parlement.*, 1896, p. 72.

3. Art. 152. See *Pasicrisie*, 1909, III, p. 120, where is given the decision of a tribunal yielding to the opposition made by a father to the marriage of his son who was of age, and forbidding the celebration of the marriage before the age of 25 years. See also *Pasicrisie*, 1910, III, p. 301.

It is to be noted that, according to what we have said in nº 46, parents can, in virtue of art. 173, make legal opposition to the marriage of their children for any reason whatever, until the latter are of the full age of 25 years. But there is this difference, that opposition made in virtue of art. 173, if it is not founded on a legal motive, must be set aside by the judge ; while, in the case of opposition made in virtue of art. 152, it is within the power of the judge to forbid or permit the marriage, even in the absence of any legal impediment.

In *France*, in virtue of the law of 21 June 1907 (in the terms of which the consent of the parents is no longer required for the marriage of a son who is of age), the contracting parties are no longer bound to anything with respect to their parents, when they have attained the age of thirty. Before that age, if they have not obtained the consent of their parents, they must *notify* them of their intended marriage, and thirty days after this notification, the marriage may take place. Planiol, o. c., I, nº 775. On the *German* legislation, see Crétinon, l. c., p. 163 s.

parents, under the same restrictions as we have mentioned in I, A, 1. If the father and mother are both dead, or if they are incapable of manifesting their will, the consent is required, not of the grandparents, but of the *guardian ad hoc ;* art. 153.

2. *Over the age of 21 years*, they are subject to the same legislation as legitimate children ; art. 158.

B. *Natural* children *not acknowledged*, who have not yet attained the age of 21 years complete, must obtain the consent of their *guardian ad hoc ;* nothing more is required.

Article 5. Impediment of Mixed Religion.

To explain this impediment, we will first give the definition of a mixed marriage ; and we will then prove : 1. that it is valid but illicit ; 2. that it may become licit by a dispensation, under certain conditions ; 3. we will point out the duty of the parish priest with regard to the question of a mixed marriage about to be, or already contracted.

First Point. Definition of a mixed marriage.

251. Definition of a mixed marriage.

A marriage is called a mixed marriage when it is contracted between two *baptized* (1) persons, of whom one is a *Catholic* and the other a non-Catholic, whether a heretic or a schismatic (2).

Note that, in order to be reputed a heretic or schismatic, in such a way that there arises a question of mixed marriage, it is not enough that the person should have been guilty of the sin of heresy or schism, but he must be an adherent of some heretical or schismatical sect.

Undoubtedly it is necessary to reprobate, and the Church does reprobate marriages between Catholics and those who have

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1. If one of the intending parties is baptized and the other not, there is then an impediment, not of mixed religion, but of *disparity of worship*. If the baptism of the one party is doubtful, authors are not agreed as to the solution of the case. We will treat of this controversy when we come to speak of disparity of worship, in n° 290.

2. To the question : « Must marriages between Catholics and *schismatics*..., from the point of view of the canonical conditions to be observed, be put upon the same footing as mixed marriages between Catholics and heretics » ?, the S. C. de P. F. replied : « *In the affirmative* ». Cf. Theol. Mechl., o.c., p. 214.

denied their faith or cut themselves off from the communion of the faithful, without becoming members of any sect ; but such marriages do not incur the canonical impediment or the special prohibition of the Church. There is no occasion, under such circumstances, to ask for a dispensation, or to grant it on certain conditions (1).

In conformity with the answer of the C. S. O., of 6 Apr. 1859, adherents of heresy are : « a/ those who, having been baptized as Catholics, have been brought up before the age of seven in heresy, and still profess it ; b/ those who have been brought up not so much in heresy as by heretics, that is to say, who have not received any, or scarcely any, instruction in the heretical doctrine, and have not really frequented heretical worship, though they have sometimes taken part in it ; c/ those who in their infancy have fallen into the hands of heretics, and have thus become members of some heretical sect ;... d/ those who, being born of heretical parents and baptized in heresy, have reached adolescence without ever having made solemn profession of heresy » (2).

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1. See the decree of the C. S. O., of 30 Jan. 1867 : « When it is a question of a marriage between a Catholic and a person who has denied the true faith in order *to become an adherent of some false religion or sect*, it is necessary to ask for the customary dispensation, and to impose the well known prescriptions and the ordinary clauses ; it is otherwise, if the said person has denied the faith without becoming an adherent of any false religion ». *Collectanea*, n° 1300.

2. See Collectan², n. 1174 ; cf. *Rev. eccl. de Liège*, 1907, p. 302 ; *N. R. th.*, XV, p. 502.

It might be asked if, in determining the impediment of mixed religion, it is not necessary to take into account the rule laid down in art. 11 of the Decree *Ne Temere*, which does not exempt from the impediment of clandestinity, and consequently does not assimilate, in this point, to non-catholics, those heretics or schismatics who have been baptized as Catholics, or those who have been converted for a time to the Catholic Church.

It would seem not : for, on the one hand, the reasons that prove the illicitness of mixed marriages hold good in all the contingent cases, whether the contracting party, being actually a non-catholic, has been baptized as a Catholic or not, whether he has been temporarily reconciled to the Church or not ; on the other hand, it fares differently with the exemption from the impediment of clandestinity. For this reason we agree with De Becker, *Legislatio Nova*, p. 46 ; Wouters, o. c., p. 85, and Schaepman-Van de Burgt, o. c., n° 243, that the word *non-catholic* is not to be taken here in the sense that the Decree *Ne Temere* gives it. See above, n° 77 and the note, also n° 79.

Second point. Validity and illicitness.

I. Validity.

252. *A mixed marriage is valid,*

There is no doubt that mixed marriages are *of themselves* valid. This is proved by the various documents cited by Feye (1), and especially by the Instruction of the C. S. O., 12 Dec. 1888 (2) : « Marriages of Catholics with heretics, and conversely, are illicit, but nevertheless *valid*. There is, therefore, a great difference between the impediment of mixed religion, and that of disparity of worship properly so called... ; marriages between persons of different worship are absolutely null, and mixed marriages are valid, but gravely illicit » (3),

We say *of themselves*, because frequently other impediments of the divine natural (4), or even of the ecclesiastical law, come to be added thereto, and render such marriages invalid. The ecclesiastical law, as we have already seen, is not excluded ; on the contrary, by reason of the baptismal character possessed by heretics, it affects them generally by its impediments (5).

II. Illicitness.

Mixed marriages are *gravely illicit* :

but gravely illicit,

a/ *regularly* by the *divine natural* law itself, by reason of the scandal resulting therefrom,and especially on account of the very grave dangers to which they give rise : the danger of perversion for the Catholic party, the danger of bad education for the children, the danger of increasing indifference in the matter of religion, and finally the danger of discord between the married parties, separated, as they are, by diversity of belief. See the *Letters Apostolic* of Pius VIII, of 25 March 1830, and of Gregory XVI, of 30 Apr. 1841 ; the Instruction of the Secretary of State, of 15 Nov. 1858 ; the

1. *De matrimoniis mixtis*, p. 82-88.

2. *Collectan.*, nº 1444, 1.

3. See below, nº 258b, the evolution of ecclesiastical legislation with relation to mixed marriages.

4. Thus, it is necessary to inquire with very special care if the marriage has been contracted, at least by the non-catholic party, under a suspensive condition contrary to the very essence of marriage, as for example, that of breaking the bond in case of adultery.

5. Attention must also be given, especially since the decree *Ne Temere*, to the impediment of clandestinity.

Instructions of the C. S. O., of 3 Jan. 1871 and of 12 Dec. 1888 (1); the Constitution *Arcanum*, of Leo XIII (2).

b/ They are also so *by the ecclesiastical law ;* the law of the Church forbids such marriages under pain of mortal sin, by reason of the presumption of general danger, of which we have just spoken (under a/).

This prohibition follows quite clearly from the various documents mentioned above, and also from the declaration of Benedict XIV, of 4 Nov. 1741, and from the Encyclical Letter of the S. C. de P. F., of 11 March 1868 (3). See also BENEDICT XIV, *De Syn. dioec.*, l. IX, c. III, n° 1, and the authorities quoted by FEYE, *De Matrim. mixtis*, p.171-176, and *De Imped.*, n° 567, together with the note ; finally, see the proofs drawn from Holy Scripture, in the Fathers and Roman Pontiffs ; they are given by Mgr. KORUM, o. c., p. 21 ss., and ENGLMANN, o. c., p. 263 ss.

Mixed marriages are, therefore, illicit *by the natural and divine law*, at least *regularly*. This prohibition, however, lapses where the observance of certain conditions removes the scandal and renders remote the dangers enumerated above, when there is at the

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1. These texts are given in the *Collectanea* of the S. C. de P. F., in nos 1426, 1428, 1434 and 1444.

2. Mgr. KORUM, in his remarkable pamphlet, mentioned in our list, eloquently describes the deplorable consequences of mixed marriages. He shows how the difference of religion is injurious to the intimate union of hearts and to a good understanding between the members of the family (p. 5-13) ; — how it injures the stability of the matrimonial bond, since non-catholics look upon it as dissoluble *(ibid.) ;* — how it exposes the Catholic party to religious indifference (p. 13 s.) ; — what prejudice it causes to the religious training of the children, even when the non-catholic party allows them to be brought up as Catholics,and still more, when, as frequently happens, he himself makes them go astray in the direction of heresy or indifference (p. 14-17). See also VAN DE BURGT-SCHAEPMAN, o. c., I, n. 275.

During the last decennial periods, Germany, among others, has experienced the unhappy consequences of mixed marriages. Cf. the *Rev. eccl. de Metz*, 1903, p. 633-534 ; 1906. p. 264 ; the *Rev. d'Hist. ecclés.*, 1906, p. 685 ss. ; the *Bien Public*, of 21 Feb. 1908 ; BÖCKENHOFF, *Ehret die Ehe*, p. 29 ss. ; the *Etudes Religieuses*, 29 Oct. 1904, p. 191 s., which also describes the heroic struggle maintained by different Bishops of Germany on the question of mixed marriages, at the beginning of the nineteenth century. See also the *Archiv. f. k. Kirchenrecht*, 1909, p. 570 s.

3. *Collectanea*, nos 1420 and 1433.

same time a grave reason for marrying. Nevertheless, these marriages remain, even then, *absolutely* forbidden by the *ecclesiastical law*, since the law of the Church is based, not on a presumption of fact, but on a presumption of general danger.

Third point. Need of a dispensation ; its conditions and its cause.

I. Need of a Dispensation.

Only a dispensation renders a mixed marriage licit.

253. *unless adispensation be granted,*

1. The granting of a dispensation evidently presupposes that the observance of the clauses, of which we shall speak presently, removes the prohibition of the natural divine law, so that the prohibition of the ecclesiastical law alone remains to be dealt with : then only can the Church, without injury to the natural divine law, derogate from its own law (1). Moreover, when the Church grants the dispensation in question, it implicitly declares, by the very act of removing its own prohibition, that the natural divine law puts no obstacle thereto (2).

2. Without a *dispensation*, the marriages of which we are speaking, do not become lawful either by any *custom* whatsoever (3), or by the *toleration* that the Church has shown in certain countries (4).

The two propositions enunciated in 1. and 2. are briefly embod-

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1. In permitting mixed marriages, the Church at the same time dispenses from the law by which it forbids *communicatio in divinis* with heretics.

2. Benedict XIV, *De Syn. dioec.*, l. IX, c. III, n° 5.

3. *Ibid.*, n° 2 : « In this matter, it is to no purpose to oppose any contrary custom whatever, when unsupported by an express pontifical dispensation ». In like manner, the *Instr.* of the C. S. O., of 3 Jan. 1871 (*Collect.*, n° 1434, ad 2m) says : « Although for a long time past,the opinion has spread that mixed marriages may be licitly contracted without the dispensation of the Holy See, that opinion, whatever may be the custom to the contrary, cannot be tolerated ». See Feye, *De matr. mixtis*, p. 177 ss. ; the *N. R. th.*, XV, p. 502 ss.

4. *De Syn. dioec.*, l. c. ; *Litt. Apost.* of Gregory XVI, in 1841 (*Collect.*,n° 1428) : « If in certain places, on account of the difficulty of the locality and the times, such marriages are tolerated, this forbearance can in no way be regarded as a kind of approbation or consent, but as a mere toleration, introduced by the necessity of avoiding greater evils but not by our will ». See also the *Instr.* of the S. C. de P. F., of 1858 ; Collect., n° 1429.

ied in the *Instructio* of the C. S. O., of 12 Dec. 1888, l. c., n° 7 : « Supposing, then, that there are canonical reasons, and that the parties interested have accepted the necessary conditions that remove the veto of the natural and divine law, it is still necessary to ask from the competent ecclesiastical authority a dispensation from the law that forbids mixed marriages, in order to be able to contract them without sin ; without such dispensation, they are never exempt from grave sin ».

II. Conditions and guarantees required.

254. *under certain preliminary conditions,*

In the first place several *conditions* must be imposed, especially : « 1. that there be no danger of perversion for the Catholic party ; 2. that all the children of both sexes be brought up in the Catholic religion ; 3. that the Catholic party endeavour to convert the other to the true faith and Catholic unity » (1). Moreover, to these three conditions must ordinarily be added a fourth, viz., that neither before nor after the marriage, shall the parties present themselves before a heretical minister (2) as such, i. e., in the exercise of his office (3).

The *first three* conditions are required in virtue of the natural divine law, so that they must always be imposed without any exception (4). The interested parties cannot in this instance be left in good faith (5) ; on the contrary, even *in articulo mortis* it is still

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1. *Instr.* of the C. S. O., of 3 Jan. 1871, in the *Collect.*, n° 1434.

2. This clause is formally inserted in the formula, the use of which Pius IX made obligatory on all the Congregations. See the *Instr. of the Secretary of State*, 1858, reproduced in the *N. R. th.*, XV, p. 529.

3. See the Instructions of the C. S. O., of 17 Feb. 1864 and of 12 Dec. 1888, in the *Collectanea*, n^os^ 1431 and 1444 ; cf. likewise Van de Burgt-Schaepman, o. c., I, n° 282 ad 5^m^. Observe that it is a question of a heretical minister *as such*, and not of those cases in which the parties present themselves before him in the excercise of his *purely civil* functions, though at another distinct moment he also performs the office of a minister of heretical worship.

We say : in the exercise of his *purely civil* functions ; it follows from this that in England, for instance, Catholics cannot give their consent before an Anglican clergyman, though he be an officer of the civil state : for he *at the same time* performs his office as a minister of worship.

4. « As to these conditions, they can never be omitted or dispensed from, since they are based on the natural and divine law itself ». *Instr. of the Secretary of State*, of 15 Nov. 1858, in the *Collect.*, n° 1430 ; see also n^os^ 1434 and 1444.

5. The Catholic party must be informed of the conditions to be observed, « and

necessary to exact these three conditions (1); for before the Church can dispense from the impediment of mixed religion, it must have an assurance on the subject of the divine natural law. As to the *fourth* condition the parties may, under certain circumstances, sometimes be left in good faith, according to the *Instr.* of the C. S. O., of 17 Feb. 1864 and of 12 Dec. 1888 (in the *Collectan.*, nos 1431 and 1444, under 8, and 9), (2); see also the *N. R. th.*, XV, p. 122 ss., and 593-598, and the *Collat. Brug.*, t. VIII, p. 571 s. (3).

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the parish priest cannot dispense himself from giving these admonitions and instructions, under the pretext that the Catholic party is in good faith, and that it is necessary to guard against the material sin becoming a formal one ». *Instr.* of the C. S. O., 3 Jan. 1871, no 1434 ad 4m.

1. *Instr.* of the C. S. O., 18 March 1891 (*Collect.*, no 2188). See also the *Instr.* of the C. S. O. to the Bishops of Hungary, 21 July 1880 (*N. R. th.*, XIV. p. 5 ss.) and the letters of Cardinal Rampolla to the Primate of Hungary, 7 July and 26 Sept. 1890 (*N. R. th.*, XXII, p. 387 ss.). In these documents the Holy See strictly exacts these conditions, especially that which regards the Catholic education of all the children, and it insists on their necessity and observance notwithstanding any civil laws that unjustly oppose them.

2. « Moreover, if pastors are questioned by the contracting parties, or if they have good reason to know that they will present themselves before a heretical minister as such, for the purpose of giving their matrimonial consent, they must know that they can by no means keep silence, but must warn the parties of the very grave sin that they are committing. Nevertheless, in order to avoid considerable evils, if, in a particular case, the priest or parish priest has not been consulted by the parties concerning the permissibility of presenting themselves before a heretical or schismatical minister, or explicitly informed by them of their intention to do so ; if he foresees that they will return to give or renew their consent before him, but at the same time the circumstances make it clear to him that his admonition would certainly be unsuccessful and even harmful, inasmuch as it would cause the material sin to become a formal one, he must then keep silence, if there is no fear of scandal, and provided that the other conditions and guarantees required by the Church have been duly observed, especially the promise of leaving to the Catholic party the free exercise of his (or her) religion, and that of bringing up all the children in the Catholic religion ».

3. *Formerly* the following clause was inserted in the indults : « except *Italians*, in whose regard there is no proof that they have altogether given up their Italian domicile ». This clause was suppressed by the decree of the C. S. O., of 4 May 1887. See the *N. R. th.*, XX, p. 37, and XV, p. 575, where is added : « The intention of the Holy See was to preserve Italy from heresy and from the residence of heretics. It was with the same object that the Holy Office adopted a measure noticed by De Angelis : ' Even if foreigners have their residence in Italy, it is always ordered that marriage should take place beyond the Italian frontier ' ».

Moreover, the imposition of the conditions, especially of the first three, does not satisfy all requirements ; one cannot proceed to obtain a dispensation and celebrate the marriage, until *proper guarantees* for their observance have been given before the judge of the external forum.

and real guarantees given,

This is why it is necessary to demand from the intending parties *guarantees* (1), or loyal and sincere promises as to the full observance of the conditions. « The ecclesiastical superior must have moral certainty, both of the sincerity of the guarantees in the present, and of their observance in the future » (2) ; he cannot in any way tolerate that « a hope resting solely on the good will of the contracting parties should take the place of real guarantees » (3).

Thus the *rule* is that a dispensation from Mixed Religion is not given *licitly*, except with the imposition and acceptance of the customary conditions, just described (4), whether it be a question of a marriage already contracted or of one in contemplation, whether the dispensation be given by the Holy See, or by a Bishop, in virtue of an indult or rescript, in a particular case.

This rule, however, admits of a *twofold derogation* in respect of a dispensation granted by the Holy See :

a/ The condition that requires the Catholic party to endeavour to procure the conversion of the non-catholic party may be remitted by the Holy See, or not expressly exacted, as the S. Rota observes, in *Causa Baltimoren.*, 30 June 1910 (*A. A. S.*, II, p. 595 s.).

b) It seems that if the Catholic party is well disposed and promises to fulfil all the clauses to the best of his ability, when the

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There was a time when yet a fifth condition was exacted, « the abjuration of heresy ». Cf. the *N. R. th.*, XV, p. 521 ss. ; WERNZ, o. c., nº 576.

1. The guarantees must not be confounded with the conditions : the former are an assurance of the observance of the latter.

2. *Instr.* of the C. S. O., 21 July 1880, in the *N. R. th.*, XIX, p. 7.

3. *Ibid.*

4. The fourth condition, which sometimes occurs, of not appearing before a minister of some other religion, may be more easily neglected, and it may be left to the good faith of the parties, since its non-observance is less prejudicial to the future habitual state of the parties, and it only involves a transient act. Cf. *Canon. Contemp.* 1912, p. 503 ; *Irish Eccles. Record*, 1912, p. 539 ; *N. R. th.*, 1913, p. 11.

non-catholic party refuses, a dispensation could be granted to the former, and he could be admitted to marriage, *in a case of very urgent necessity*, that is to say, when his eternal welfare depends on it, but always on the strict condition that their is no danger of perversion. See the *N. R. th.*, XV, p. 427 ; De Becker, *De Matr.*, p. 242 s. ; the decrees cited in the *Collectan.*, nos 1263, 1271 and 1273, and the decree of the C. S. O., of 12 Apr. 1899, in the *N. R. th.*, XXXI, p. 654. This last decree concerns the case of a marriage already *contracted* in which, notwithstanding the evil dispositions of the non-catholic party, *revalidation* is granted in favour of the Catholic party, who is well disposed, and for the purpose of legitimating the children, provided, of course, there is no danger of perversion. This reply, allowing for the difference, might, perhaps, be made use of advantageously in the case of a marriage *to be contracted*, in very urgent necessity.

We say : in respect of a dispensation granted *by the Holy See* ; for a *Bishop*, dispensing in virtue of an indult or rescript, is considered to be strictly bound to the observance of the clauses contained therein. But should there be some very urgent necessity, (see under b.), and no time for recourse to the Holy See, the doctrine that we shall explain below, in n° 357, might be applied, and the Bishop might declare the impediment of Mixed Religion to be no longer binding in the case.

What we have said as to the *licitness* of granting a dispensation in virtue of an indult or rescript, holds good also with regard to its *validity* (1). See below, n° 291.

As to the *form* in which these guarantees are to be given, nothing in particular is prescribed *either by the natural law or by the common ecclesiastical law ;* it is sufficient to furnish the moral certainty of which we have just spoken. It is not, therefore, necessary, at least in general and at the present time (2), that these promises should be given on oath (3), nor even that they should be given in

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1. A dispensation in the matter of Mixed Religion is said to be *invalid*, in the sense that the prohibition of the ecclesiastical law is not considered as removed by it, and consequently it would have to be renewed, if the defect were discovered before the marriage took place.

2. On the practice formerly in force, see the *N. R. th.*, XIV, p. 511, and XV, p. 576.

3. *Collat. Brug.*, t. VI, p. 421 ; decree of the C. S. O., 17 Febr. 1875, in Gasparri, o. c., n° 453.

writing especially by the Catholic party (1). It is, however, better to have them in writing, so as to facilitate the proof of them in the forum externum (2), and remove scandal more surely. According to the decree of the C. S. O., of 10 Dec. 1902, *of itself and in general (per se et generatim)*, one cannot be contented with « the assertion of the Catholic party, confirmed by oath, that the non-catholic party has promised him (or her) to observe the conditions (3). »

If in the rescript of dispensation, or *in the particular law*, a fixed form is prescribed, it must evidently be employed (4).

Finally, as the *Instr.* of the S. C. de P. F., of 25 June 1884 (n° 1442) reminds us, « after the celebration of a mixed marriage, parish priests must know that they are under a grave obligation of conscience to see that the conditions promised by the parties are observed and produce their effect ».

Note. With regard to the *condition* to be observed in the *celebration* of a mixed marriage, which concerns the parish priest rather than the contracting parties, we will speak of that in the following point.

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1. See the *Letter Apost.* of the S. C. de P. F., of 17 Apr. 1897, in GASPARRI, o. c., n° 453 ; see also WERNZ, o. c., n° 587, note (32).

2. *Collectan.*, n° 1440 *N. R. th.*, XIX, p. 7.

3. *Collectanea*[2], n. 2155, where the C. S. O. itself explains the words : *per se et generatim*. Cf. *Collat. Brug.*, t. VIII, p. 568 s.

4. The Council of Latin America, held in Rome in 1899, requires a written *and sworn* promise. See the *Acta et Decreta*, n° 591.

At Rome, a written promise is required from each of the parties, and also the oath of the Catholic party. See *Instructions*, l. c., p. 607.

In the *diocese of Bruges*, before asking for a dispensation, the intending parties must both sign a written promise (but without taking an oath), by which each of them undertakes to observe faithfully the conditions that concern them respectively. These two declarations must be made in duplicate : one is to be transmitted to the Bishop, and the other kept by the parties as a perpetual reminder of the obligations that they have taken upon themselves. The parish priest on his part, must attest that there is a well founded hope of seeing the promises kept.

Below, n° 391, in a note, is given the text of the form to be signed ; the *Catholic* party undertakes to see to the Christian education of the children, to labour for the conversion of his (or her) partner, and not to appear before any minister of another religion ; the non-catholic party promises, besides the Christian education of the children, to leave the Catholic party religious liberty, and not to go to a heretical minister.

III. Cause.

255. *and for a proportionate cause.*

In addition to the imposition of the conditions already enumerated, there must be a *cause* for dispensation, and this is required for two reasons ; first of all, a/ on account of the derogation made from the ecclesiastical law : for in such cases, general principles require a proportionate cause (1) ; and secondly, b/ in order that the prohibition of the divine natural law may lapse. This second reason is suggested in the *Instr.* of the C. S. O., of 12 Dec. 1888, the text of which is given below (2).

What is a requisite and sufficient cause ? It is impossible to determine it with exactitude. There must certainly be a really grave cause, and it is better to allege one of those that concern the *public good*, such as are proposed by BANGEN (3) : « a/ if a non-catholic prince, giving the required guarantees, wishes to marry a Catholic, and there is reason to hope that great advantages will accrue therefrom to the Catholic religion ; b/ if there is a probable hope that a non-catholic family, already inclined towards the true faith, will return to the Church through a mixed marriage ; c/ if a mixed marriage is the only means by which children, already born of another mixed marriage, may be brought up in the true religion ; d/ if great scandals : defamation, pregnancy, or other matters (e. g., marriage before a heretical minister), are in question, and the only means of avoiding them is a mixed marriage. »

Nevertheless, at the present time (4), Rome does not refuse to admit causes of a *private* kind ; and if, taken separately, they are insufficient, it yet takes them into account when there are several of them, or when certain circumstances give them a special importance.

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1. VAN DEN BERGHE, o. c., n° 150.

2. See also the *Encycl. Letter* of the S. C. de P. F., of 11 March 1868, in the *Collectan.*, n° 1433 : « In order to permit a mixed marriage, it is not at all sufficient that the intending parties should be ready to give the guarantees and to accept the other conditions ordinarily imposed in the rescripts of the Holy See ; it is, moreover, absolutely requisite that there should be just and grave *causes*, in order to exercise licitly the power of dispensing from the impediment of mixed religion. For these guarantees (or rather conditions) are required and must be required by the natural divine law, for the removal of the dangers inherent in mixed marriages ; but in order that the faithful may be permitted to expose their faith and morals to the danger (which exists more or less) even under the required conditions, it is necessary that they should be menaced by some grave harm which it is impossible otherwise to avoid ».

3. *Inst. pract.*, IV, p. 20 s.

4. Cf. WERNZ, o. c.. n° 586 ; *Collectan.*, n° 1426.

FOURTH POINT. DUTY OF THE PARISH PRIEST AND CONFESSOR.

I. Before a mixed marriage, that a Catholic wishes to contract.

256. *Duty of the parish priest:*

1. The parish priest will employ all his zeal to turn from their design those of his parishioners who desire to contract mixed marriages (1).

1. before the marriage:

2. If he does not succeed in this, he will endeavour to obtain a serious promise that the prescribed conditions shall be observed, especially the three that are of natural divine law; he will also see that the marriage is not celebrated until after a dispensation has been obtained (2).

3. Should the intending parties be thinking of contracting the marriage illicitly, either because they are unwilling to comply with the conditions, or because they neglect to ask for a dispensation, the parish priest will do all in his power to bring them to a better way of thinking.

If all his efforts are useless, and the parties persevere in their evil purpose, he cannot absolve them; nevertheless, they are not on that account to be abandoned entirely, but the parish priest must endeavour as far as possible, to secure the observance of the conditions, especially of that which concerns the education of the children.

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1. In places where mixed marriages are of frequent occurrence, it is advisable also by public instructions from the pulpit, to let the people know the severe discipline of the Church in this matter, and to inspire them with a detestation of such marriages by setting forth their very disastrous consequences. See the declaration of Benedict XIV, in the *Collectan.*, nº 1420; and the wise measures taken for this purpose by the Archbishop of Utrecht, in 1906, in VAN DE BURGT-SCHAEPMAN, o. c., 282.

2. The difficulty in obtaining the promise of observing the conditions, almost always comes from the non-catholic party, owing to his prejudices against the true religion. *The Ecclesiastical Review*, 1909, p. 742 ss., the *Ned. Kath. Stemmen*, 1911, p. 185 ss., and SCHULZE, *Kirchl. k. Eherecht...*, l. c., p. 821 s., propose, as a means of dissipating these prejudices, to require of the non-catholic party attendance at a course of religious instruction before the marriage. Certain dioceses already require this, and refuse a dispensation, unless this preliminary instruction has taken place. This is notably the case in the dioceses of Denver and Omaha, and in the whole province of Milwaukee. Cf. *Eccles. Review*, t. XXXIX, p. 436 ss.

II. In the actual celebration of a mixed marriage.

257. 2. *in the actual celebration of a mixed marriage,*

The rule for the **assistance** of the parish priest is as follows :

1. *If it is a question of mixed marriage to be contracted* **licitly**, *that is to say, with the conditions duly accepted and after a dispensation has been obtained : the parish priest can assist at its celebration, but in general passively, and the marriage must take place elsewhere than in the church.*

Explanation.

a) *licitly contracted ;*

a/ This clause concerning the passive assistance of the parish priest is understood in every faculty of dispensation for mixed marriages, when it is not formally expressed. See the *Instr.* of the Secr. of State, 1858, n° 1430.

b/ By *passive assistance* is to be understood that which excludes all religious ceremony (1). The priest assists at the marriage, as they say, *in nigris*. Nevertheless, this assistance is not now, as formerly, absolutely passive, but it is necessary that the parish priest should, on receiving an invitation and request to that effect, ask and receive the consent of the contracting parties (2).

c/ *Elsewhere than in the church :* nevertheless, the consent may be received in the sacristy, and even, « in parishes where there is not a convenient sacristy, in some other place adjoining the church, such as a remote chapel, without lighted candles, or any special ornament » (3). It is better, according to FEYE, *De Imped.*,

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1. Therefore, it is not only the solemn blessing inserted in the Mass *pro sponso et sponsa* that is forbidden, but also every ceremony prescribed in the Ritual, the use of sacred ornaments, and even the publication of the banns ; but not, according to FEYE, *De Imped.*, n° 571, the certificate of marriage. See GASPARRI, o. c., n^{os} 475-463 ; ENGLMANN, o. c., p. 273 ; *N. R. th.*, XV, p. 589-593 ; FEYE, *De Matrim. mixtis*, p. 187-193.

2. Until quite recently the *purely* and *simply* passive assistance of the parish priest sufficed, without any positive act ; it was sufficient that he should hear the consent given and be a witness of it. But at present, according to the provision of the Decree *Ne Temere*, art. IV, for the very validity of the marriage, it is necessary that the parish priest should, « when invited and requested, and not constrained by violence or grave fear, ask and receive the consent of the contracting parties ». The Decree of the S. C. C., of 27 July 1908, ad 3^{m}, declares that this provision applies to mixed marriages also, with the exception mentioned at the end of this number. See above, n^{os} 64 and 147.

3. Decree of the C. S. O., of 17 Jan. 1877, in the *N. R. th.*, XX, p. 562 ss. ; THEOL. MECHL., o. c., n° 62, qu. 6.

n° 571, that the marriage should take place in some quite secular — but becoming — place, provided the statutes and usages of the diocese are not opposed thereto (1).

d/ The reason why the Church is so severe, is, says the *Instr.* of 1858 (n° 1430) « in order that Catholics may ever bear in mind both the canons, which condemn marriages of that kind, and the ceaseless care with which our Holy Mother, the Church, has never desisted from withdrawing and deterring her children from contracting such mixed marriages to their own loss and that of their future offspring » (2).

e/ We say : *in general*, because *active* assistance is *sometimes* tolerated :

« If, in certain places, the Bishops are conscious that it is impossible to observe these rules, without greater losses and evils resulting therefrom : then, and then only, for the avoiding of these evils, His Holiness *leaves the matter to the prudent judgment of the said Bishops*. When all the necessary guarantees have been duly imposed and given, and this must always be done, they shall themselves judge if it is impossible to have mixed marriages celebrated elsewhere than in the church, and without the blessing of the parish priest ; they shall decide when it is possible to tolerate the use of the religious ceremonies prescribed in the diocesan ritual for the celebration of marriages. The celebration of mass must, however , always be omitted, and all the circumstances of localities and persons must be weighed with the greatest care. It will be a duty of conscience for the Bishops to examine all these different circumstances and their gravity with the greatest care » (3).

The S. C. de P. F. also insists on the same point (4) : namely, that active assistance can be permitted only by way of exception, and on account of the gravity of the circumstances (5).

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1. Far from opposing this practice, the particular law of the diocese of *Bruges* rather favours it, and recommends that the matrimonial consent should be received at the *presbytery*. This avoids any request, that the parties might make, to be allowed to go through the church in procession, on their way to the sacristy.

2. On the assistance that parish priests formerly had to give at such marriages, see the *N. R. th.*, VI, p. 582 s.

3. *Instr. of the Secr. of State*, 1858, l. c. The S. C. de P. F., the same year, (n° 1429), also permits this toleration.

4. 11 March 1868, n° 1433 ; *Letter* of the S. C. de P. F., of 4 Dec. 1862, in the *Collectanea*², n° 1332.

5. The same letter of 1862 gives some examples : « a/ in all cases in which the

Moreover even then, the use of the religious ceremonies is permitted only so far as the necessities of each particular case require it. If the evils, that there is reason to fear, are removed by the concession of a single ceremony (1), one must not go farther. *The celebration of mass must always be omitted* (2).

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refusal to bless mixed marriages would occasion a bitter outcry on the part of heretics, and would foment hatred against the faithful and the laws of the Church ; b/ in all cases in which, on experiencing on the part of the Catholic parish priest a refusal to bless their marriage, the parties.... would present themselves before a non-catholic minister ; c/ in all cases in which there is reason to fear further, that, in consequence of the refusal of the blessing, the necessary clauses will not be observed....or, what is still worse,that the Catholic party will go over to heresy, to his own eternal loss and that of his children ». See also the *N. R. th.* XV, p. 586.

Thus in England it is the custom to permit the usual sacred rites to be observed in the celebration of a mixed marriage, though with certain restrictions, viz., « the cope must not be worn ; there must be no special adornment of the sanctuary ; the candles on the altar must not be lighted ; and the contracting parties must not enter the sanctuary ». This is in accordance with the declaration of the Bishops in 1898, who added « that at mixed marriages, instrumental music may be allowed on the bridal party leaving the church ».

1. See the decr. C. S. O., of 17 Jan. 1877, and the *Instr.* of the C. S. O., of 9 Dec. 1874, in which, in a particular case, the parish priest is directed to use the surplice only, and to omit all the other rites. The Bishop, if he judges it sufficient, may restrict his permission to the sole publication of the banns, which of itself, as we have said above, is a part of the religious ceremonies. See the *N. R. th.*, XV, p. 598 ss.. and the *Collectan.*, nº 1223. When these publications are made, it is necessary to observe the condition of which we speak below, in a note to c/, namely that no mention must be made of the religion of the parties.

Thus, recently, in the diocese of Bruges, in view of the gravity of the circumstances, it was permitted that a mixed marriage, after a single publication of the banns, should be celebrated in the church, at a side altar, before the parish priest, vested in surplice, and assisted by the sacristan, likewise in ecclesiastical dress.

2. According to the *Decree* of the C. S. O., 17 Jan. 1872 (*N. R. th.* XX, p. 492 s. ; Gasparri, o. c., nº 463), in virtue of the clause : *exclusa tamen semper Missae celebratione*, it is forbidden to celebrate not only (though directly and principally) the mass *pro sponsis*, with the prayers and blessings given in the Roman Missal, but even to celebrate after the marriage, in presence of the parties, and their friends, any Mass whatsoever, even a private one, which could be considered a part of the ceremony, even though the newly-wedded couple should not occupy a special place.

We know of a recent case,however, in which this practice was set aside ; with-

b) illicitly contracted ;

2. *In the case of* **illicit** *celebration of mixed marriage, i. e., when the parties have either ignored the dispensation, or have had it refused, or have been unwilling to bind themselves to the conditions imposed ; or again, when one is not sufficiently certain that they will observe them : then, as a general rule, the priest may not even passively assist, and his active assistance is never allowed, especially with the nuptial blessing.*

Explanation.

a/ This general prohibition, which excludes all assistance and cooperation on the part of the priest, even the giving of a certificate of marriage, is inculcated several times in different documents quoted by FEYE, *De Matrim. mixtis,* p. 193 s. ; WERNZ, o. c., n° 589 ; *N. R. th.*, XV, p. 508 s. ; and GASPARRI, o. c., n° 446 (1). It is likewise clearly supposed in the passages which we shall quote under b/ and c/.

b/ We say : *in general*, because in this matter also, by way of exception, the Holy See has granted to some countries, notably certain parts of Germany, Austria and Hungary, the following favour : « When the marriage of a non-catholic with a Catholic, or vice-versa, despite the absence of the guarantees required by the Church, can take place without scandal or greater evils,and runs no risk whatever of being interpreted to the detriment of religion, and when at the same time, one knows that it will be useful to the Church and to the common good that this marriage, albeit forbidden and unlawful, should be celebrated before the Catholic priest rather than before the heretical minister, to whom the parties would probably have recourse, then the parish priest, or any other Catholic priest delegated to take his place, can give to this

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out the knowledge and against the will of the Bishop, permission was given by Rome, that, after the giving of the consent in the sacristy, a Mass might be celebrated before the newly-wedded couple and their company, for the repose of the souls of the deceased parents of the Catholic party.

1. This is what Gregory XVI says,in his *Brief* of May 7th, 1833, to the Bishops of Bavaria : « If it should happen that a Catholic man or woman should be unwilling to give up the perverse project of contracting a mixed marriage without having asked for or obtained the Church's dispensation, or without having given the requisite guarantees demanded by the Church, then certainly, it would be the duty of the priest, to refuse to honour that marriage by his presence ».

marriage his material assistance only, without any religious ceremony » (1).

Certainly, this toleration does not render the marriage lawful ; and, without recourse to the Holy See, one could not extend it to other countries, for which the indult has not been granted (2). However, every Bishop could, we think, by virtue of his ordinary power, grant this permission *in a special and urgent case*, when there is no time for recourse to the Holy See, and more especially when he has the guarantees concerning the Catholic education of the children, or at least when there exists no engagement to the contrary (3).

c/ As the passages quoted show, the concession is limited to the passive assistance of the parish priest, in the sense indicated ; hence, there can be no blessing of the couple, nor any religious ceremony.

In confirmation of this, the *Instructio* of the S. C. de P. F., in

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1. Letter of Gregory XVI, 30th of April 1841, to the Bishops of Hungary ; in the *Collectan.*, nº. 1428 ; *Apost. Letter* of Pius VIII, 25th of March 1830, nº 1426 ; *Instructio* of the S. C. de P. F., in 1858, nº 1429 ; *Instructio* of Cardinal Lambruschini, annexed to the letter of Gregory XVI, nº 1428, in a note ; *Instructio* of Cardinal Bernetti to the Bishops of Bavaria, 12th of September 1834, in the *N. R. th.* p. 513 ; Instructio 22 Maii 1841, ad Episcopos Austriae ditionis in foederatis Germaniae partibus, in KUTSCHKER, o. c., IV, p. 720 ss.

2. The Roman documents which we have just cited, seem to us to constitute not a declaration of right, but a derogation from right. Thus the following authorities interpret it : *N. R. th.*, p. 509 s. ; FEYE, *De Imp.*, nº 570 ; GASPARRI, o. c., nº 447 ; WERNZ, o.c., nº 589 ; LEHMKUHL, *Th. Pr. Quartalschr.*, 1913, p. 117, and the *Archiv. f. k. Kirchenr.*, 1909, p. 568. The decree of 1912, which we shall quote presently, confirms this view. SCHERER, o. c., p. 424 s., and LEITNER, *Lehrb.*, p. 362 s. are two authors who hold a different view.

The peculiar circumstances under which the Holy See thought fit to exercise a degree of toleration in certain places (and would still give the same permission without too much difficulty, in a particular case), were that the priest should find himself compelled to assist at the marriages (*N. R. th.*, XV, p. 511 ; GASPARRI, o. c. nº 447), or that it was feared, lest, as a consequence of his refusal, numerous marriages whould be celebrated before a heretical minister, or in an invalid manner : under the new regime of the *Ne Temere*, greater care than ever must be taken on this point.

3. The letter of Gregory XVI in the year 1841, would seem to insinuate this ; see also VAN DE BURGT-SCHAEPMAN, o. c., I, nº 282. The author treats especially the case in which one knows that the parties will present themselves before a heretical minister,

1858, says that the Sovereign Pontiffs « have never allowed the blessing by the priest, or the other rites of the Church, in these (unlawful) marriages ; rather have they always declared in formal terms that all sacred ceremonial must be omitted ». Moreover, this is easy to understand. As the same Instruction goes on to say, « a Catholic priest cannot bless a marriage which Catholics cannot contract without very grave sin » (1). The decree of 1912, of which we shall speak presently, has recently recalled this.

In this sense the Holy See has made but one single concession : i.e to allow at times the *publication* of the banns, which is of itself also a part of the sacred rites (2).

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1. « And let no one say that the Church, which at times tolerates passive assistance to avoid scandal or greater evils, could, for the same reason, allow the priest to give the blessing to the parties who demanded more than this passive assistance, even though these marriages are unlawful. In fact, the nature of passive assistance is quite different from that of the priest giving the blessing. The parish priest who,through the tolerance of the Holy See,and solely to satisfy the law of the Council of Trent,lends, as a witness, his purely material assistance to an unlawful marriage, suffers to take place before him that which he cannot prevent, and which, if he acted otherwise, would turn to the detriment of the Catholic party and of the Church. He says nothing, he does nothing which seems to approve of, or to justify the unlawful and pernicious act of the Catholic : nay more, by the very fact that he assists at this act sacred of its very nature, without any of the prayers and ceremonies by which the Church approves of other marriages and renders them more solemn, he openly proclaims by his very silence and abstention, that the Catholic party is contracting a marriage,reproved and condemned by the Church as unlawful and pernicious. On the contrary, a priest, by blessing such marriages, would not merely suffer to be done that which he was powerless to prevent, but by his own action he would participate in the crime of another ; and further, while profaning the sacred and public ministry which he exercises, he would appear to approve, both in his own name and in the name of the Church, of these unlawful mixed marriages, and to give countenance by his own action to a licence, so dangerous to the salvation of souls and to the cause of the Faith ». *Ibid.*,in the *Collectan.*, n° 1429.

2. The Holy See has in fact granted to Bishops of certain countries, in view of special circumstances, permission « to allow Catholic priests to publish the customary banns, no mention being made of the religion of the parties, and to deliver a certificate of the publication, in which, (provided there be no diriment impediment), they simply declare that,apart from the prohibition of the Church concerning the mixed marriage impediment, there is no other impediment to the celebration of the marriage ; without inserting the least word which

But as regards the *passive presence* of the parish priest, we have here a derogation in the case of the rule of the Decree *Ne Temere*, concerning the asking and receiving of consent. For the decree of the C. S. O., 21 June 1912 (*A. A. S.*, IV, p. 443 s.), determines that this rule of the Decree *Ne Temere* is not in force for mixed marriages at which, without the customary promises having been made, the assistance of the priest is permitted by the Holy See; that is to say, the assistance to be given at such marriages is strictly passive, like that in use before the Decree *Ne Temere*. Cf. *Collat. Brug.*, t. XVII, p. 561 ss.; *Ecclesiastical Review*, t. XLVII, p. 477 ss.; *Th. Pr., Quartalschr.*, 1913, p. 116 ss. (1).

III. **Once the mixed marriage has been contracted.**

258 a. 3. after the marriage : a/ lawfully contracted ;

A. If it has been contracted **lawfully**, it suffices that the parish priest watch over the observance of the imposed conditions, more especially that there be no danger of the perversion of the Catholic party, and that the Christian education of the children be not neglected.

b/ unlawfully contracted.

B. If the marriage has been contracted **unlawfully**, whether because the parties have omitted to seek a dispensation, or because they have refused to observe the conditions, or because they have presented themselves before a non-catholic minister, then :

1. If the marriage has been a **valid** one :

a/ « Catholic husbands or wives should be made aware of the sin that they have committed, and the strict obligation to observe the ordinary conditions; especially that of bringing up, as far as possible, all their children in the Catholic religion; notwithstanding any promise to the contrary, even though they may have made it on oath, seeing that such promise was sinful » (2).

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might give the impression that they consent or approve ». Instruction of Cardinal Lambruschini, 30th of April 1841, in the *Collectan.*, in a note to n° 1428. The same indult is repeated in the Instruction of the S. C., de P. F., 1858, n° 1429.

1. As this discipline of tolerance, tolerating the assistance of the parish priest at mixed marriages illicitly contracted, is to be restricted to those places for which the concession is made, so the derogation made from the Decree *Ne Temere* as to assistance at marriage, cannot be extended to illicit mixed marriages, at which, outside of the said places, a priest may, perchance, with the Bishop's permission, assist in some urgent case.

2. *Instr.* of the C. S. O. 3 Jan., 1871, in the *Collectan.*, n° 1434, under 5.

b/ « If, sincerely regretting their fault, they return to a better frame of mind, they may be *admitted to the reception of the Sacraments*...., after receiving a salutary penance, and having imposed on them the obligation to strive with all their power to fulfil the conditions required of them by both the natural and the divine law » (1).

Should the non-catholic party be badly disposed and the Catholic only promise to do his (or her) part, the Catholic may be admitted to the Sacraments in this case also, provided there be no danger of scandal (2) ; likewise, should the Catholic party be on the point of dying, and already unconscious, conditional absolution may be given, even though he be unable to give signs of repentance or to promise to fulfil the conditions (3).

The condition which must be especially insisted upon is that which concerns the education of the children, and it is necessary *in foro externo* that guarantees be given for the observance of the conditions for the future ; for this reason, the promise should be made in the presence of the Bishop, if it has not already been made before him (4).

If the matrimonial consent has been exchanged in the presence of a heretical minister, before the reconciliation of the parties with God, they must be absolved from the censures that they may have contracted (5) : this absolu-

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1. *Ibidem*.

2. The C. S. O., 2 June 1910, solved thus a case proposed by the Bishop of Bruges : a heretical husband had refused to promise Catholic education of a child *already born*. The reply was : « The appellant may rest easy ; let her however watch as carefully as possible over the Catholic education of that child also ».

3. Decree of the C. S. O., 6 July 1898, ad 2m (*Collectanea*, nº 2007), which refers to the teaching of S. Alphonsus, *Theol. Mor.*, l. VI, nº 483.

4. *N. R. th.*, XV, p. 113-122 ; Letter of the C. S. O., 12 March 1881, in the *Collectan.*, nº 1440. Sica, o. c., p. 374 s., is wrong in imposing approach to the Bishop with a view of obtaining a dispensation from a mixed marriage already contracted. Moreover, the making of the promises in the presence of the Bishop is not always to be insisted on in such a case. In some dioceses this is not the practice. See Vogt, o. c., p. 115 s. ; *Th. Pr. Quartalschr.*, 1912, p. 106.

5. The Catholic party by going through the form of marriage before a non-catholic minister as such, *positis ponendis*, incurs excommunication specially reserved to the Supreme Pontiff, whether he be regarded as « haereticus

tion, as a rule, should be given for the *forum externum* (1).

Concerning the two points treated under a/ and b/, see the *Instr.* of Cardinal Lambruschini, 30 April 1841, in the *Collectan.*, n° 1429, in a note ; and the documents quoted in the *Collectan.*, under n^{os} 1426, 1438 and 2186.

c/ If subsequently the non-catholic party is converted, both parties, if well-disposed, might be admitted to the nuptial blessing, after having been informed of the purely ritual character of the ceremony.

d/ « Catholics, who have contracted marriage with non-catholics before a heretical minister as such, and who then expressly consented to the non-catholic education of their children, or who

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credens », according to LEITNER, o. c., p. 356 s., or as « haereticorum fautor », according to WERNZ, o. c., n° 588, note (42). If, however, he has not contracted before a heretical minister, but has given up his children to non-catholic education, on this ground also he seems to incur the censure, as is maintained, in opposition to LEITNER, o. c., p. 359 s., by WERNZ, l. c., with whom *Theologie und Glaube*, 1912, p. 690, is in agreement.

On the censure incurred by this act, and the necessity of being absolved from it, see the *N. R. th.*, XV, p. 595 ; *Collat. Brug.*, t. V, p. 305 ; GASPARRI, o. c., n° 468 ; WERNZ, o. c., IV, n° 587, note (42). See also the decrees of the C. S. O., of 17 March 1874, of 23 August 1877, and of 10 Feb. 1892 (*Collect.*, n^{os} 1436, 1438 and 2186), as also the decree of the S. C. of the Sacr., in the *causa Dromoren.*, 26 March 1909, in the *Collat. Brug.*, t. XIV, p. 617.

1. Concerning the absolution from censures *in foro externo*, see the *Collat. Brug.*, t. IV, p. 142. It might be omitted, according to the diocesan Instruction of Metz, quoted by the *Rev. eccl. de Metz*, 1906, p. 263, when the heretical celebration of the marriage has been *quite secret*, and there is no danger of its becoming known.

If the celebration was *public*, the Bishop may require that absolution from the censure should always be given *in foro externo* : nevertheless, according to VAN DE BURGT-SCHAEPMAN, o. c. n° 282, under 5, in countries where heresy exists openly, as no one can be brought before the Church's judicial court, absolution is ordinarily given only in foro interno to those who repent. Without doubt, even in other countries, there is nothing to hinder the penitent who is under censure in foro externo, from receiving absolution in foro interno, from a confessor who has the necessary faculties, if he is well-disposed, and there is no time to refer the matter to the Bishop ; but in that case, the obligation must be laid upon him, to ask at some future time for absolution in foro externo. Nevertheless, it may be sometimes opportune to leave him in good faith on this point, when one sees that there will be difficulty in making him accept that obligation. See also LEITNER, *Lehrb.*, 368 ss.

in fact have brought them up in heresy, and so have incurred the censure, if, stricken with apoplexy and deprived of their senses, they die suddenly, without being reconciled to the Church, or without having given signs of repentance, they are to be deprived of funeral rites and ecclesiastical burial ». C. S. O., 8 May 1907 (*Anal. eccl.*, 1908, p. 487) (1).

2. If the marriage has been **invalid**, either on account of clandestinity (as may easily happen under the new regime of the Decree *Ne Temere*) (2), or because of the presence of some other diriment impediment, then :

a/ unless separation be possible and desirable, the parish priest will, as a rule, take care to *revalidate* the marriage. See further on, under n° 407.

For this revalidation, there is required, over and above the dispensation, the promise of the parties to observe the conditions and guarantees ordinarily imposed before the marriage ; moreover, eventually the absolution from censures will also be necessary. Besides this, a twofold restriction must be made. In the first place, if the parties refuse to submit to the conditions, and ignore the dispensation, passive assistance, such as we have spoken of under n° 257, will still sometimes be permissible on the part of the parish priest,the more so,because here,there is only question of revalidating a marriage. Next, if the non-catholic party is badly disposed and is willing to promise nothing, the dispensation may still be given, and the revalidation be permitted, in favour of the more docile party and for the legitimation of the children, provided that there be no danger of perversion in that event (3). If the non-catholic party refuses to renew consent, recourse may be had, in favour of the other, to a *sanatio in radice* (4).

1. If the Catholic party, already dying and almost unconscious,has been roused to repentance by the priest and has received conditional absolution, the C. S. O., in the above-mentioned decree of July 6th 1898, specifies under n° I, « that, after making known the signs of repentance, ecclesiastical burial may be given, but without pomp or religious solemnity ».

2. See above, n°s 77-79, where we have said that, with the exception of the German Empire and the Kingdom of Hungary, mixed marriages are subject to the impediment of clandestinity, even after the dispensation has been obtained.

3. See above, under n° 254.

4. *N. R. th.*, p. 579 s.; *R. th. fr.*,1897, p. 477 s.; *Collat. Brug.*, VI, p. 599 s.; Let-

b/ After the revalidation of the marriage, Catholics may or may not be *admitted to the Sacraments*, according to the rule given under 1.

c/ If the revalidation has not taken place, the Catholic party can receive conditional absolution in articulo mortis, when unconscious. *Ibidem.*

258 b. Historical notice.

Historical notice. From the end of the third century, different Councils had already enacted laws, *prohibiting* marriages with non-catholics(1), while at the same time, admitting their validity.

But in 692, the *Council in Trullo*, proclaimed unions with heretics *null and void*, and this discipline has remained in force in the *Greek* Church. Among the Orthodox, therefore, marriages with heretics (but not with schismatics), are invalid ; besides, heretics are there put on the same footing with infidels (2).

The Latin Church has not followed this example. It has confined itself to the *prohibitive impediment* (3), but has applied this to schismatics as well as to heretics.

The question of mixed marriages, thus determined, raised hardly any controversy in the Middle Ages; but the Reformation gave it renewed actuality. The Council of Trent dealt with it. It required, under pain of nullity, that the marriage should be, henceforth, celebrated *in facie Ecclesiae*. By that means, it furnished the occasion to the Sovereign Pontiff to impose conditions on the parties, and to deny them permission (or dispensation) in case of refusal, thus making it impossible to contract ... mixed marriage *in facie Ecclesiae*, and in consequence rendering it invalid. The condition at first required, was that the non-catholic party should abjure heresy, or at least, should definitely promise to be received into the Church. If this was refused, the Holy See withheld the dispensation, except when the general good absolutely demanded the contrary ; and even then, it imposed strictly the condition of educating the children in the Catholic religion, and that of

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ter of the C. S. O., 22 Nov., 1889, in the *Collectan.*, nº 1569, and above all the Decree of the C. S. O. 12 April, 1899, in the *Anal. eccl.*, 1889, p. 235 s. See below, under nº 409.

1. Such are the Councils of Elvira (300), ch. 15 and 16 ; of Laodicea (343-381), chap. 10 and 31 ; of Hippo (393), ch. 12 ; of Chalcedon (451) ch. 14.

2. SCHNITZER, o. c., p. 238 s.

3. Nevertheless, there were not wanting local decrees which appear to *invalidate* mixed marriages ; and some among the theologians and canonists of the Middle Ages maintained the nullity of a mixed marriage. See GILLMANN, in the *Archiv. f. k. Kirchenr.*, 1912, p. 194, and *Der Katholik*, 1910, II, p. 480 ; cf. also ESMEIN, o. c., I, p. 218.

allowing the Catholic party the free exercise of his (or her) religion. As regards the dispensation itself, before the eighteenth century, Rome never, so to speak, delegated this faculty.

On the other hand, certain theologians put forth, in course of time, the opinion that, in countries where heresy is publicly professed, notably in Germany, mixed marriages might be allowed without a dispensation, provided that the required guarantees were forthcoming. This opinion passed into practice, especially in the districts on the farther side of the Rhine ; these unions came even to be tolerated without the necessary clauses, and submission was made to the State requirement that the religious education of the children should differ according to sex ; that the sons should follow the religion of the father, and the daughters that of the mother. This abuse lasted till the beginning of the nineteenth century ; but finally, thanks to the repeated Instructions of the Holy See, thanks also to the glorious fight made by the Catholics (Mischehen-Kulturkampf), true doctrine and sound practice prevailed, both as regards the necessity of the dispensation and the requirement of guarantees. See SCHNITZER, o. c., p. 244 s.

CHAPTER II

DIRIMENT IMPEDIMENTS.

FIRST SERIES

DIRIMENT IMPEDIMENTS BASED ON THE WANT OF CONSENT.

ARTICLE 1. The Impediment ef Error.

259. *Definition.*

Definition.

Error does not consist in simple ignorance, but in the false idea that one has of a thing, so that one believes it to be other than it really is.

In the matter of marriage, we may distinguish 1. error *of fact*, which concerns the physical person or some quality of the same (1) ; and 2. error *of law*, which concerns the very nature of marriage or its properties. Error, whether of law or of fact, is said to be *concomitant*, when it has no influence on the marriage, so that, even if it had been discovered in time, the marri-

1. Among the qualities of the person, free or servile condition occupies a place apart. We shall treat of that specially in article 2.

age would still have been contracted, though perhaps less readily ; and *antecedent,* when its influence on the contract is such that, if it had been known, the marriage would not have taken place.

Law in force.

260.

I. **Error of fact,** 1. *as to the physical person* (1), *whether it be antecedent or concomitant, vincible or invincible, constitutes a diriment impediment of marriage.* *Error of fact as to the identity of the person, constitutes a diriment impediment ;*

The *reason* of this is that matrimonial consent, of its nature, is directed essentially to the very person with whom the contract is made, and if the essential object of the consent is wanting, the consent is thereby substantially vitiated.

2. *Error as to the quality of the person, if it is concomitant, does not invalidate the marriage ; if it is antecedent, in like manner it does not, as a rule and of itself, make the marriage null, but only accidentally and exceptionally has it that effect.* *but not error as to the quality of the person.*

Explanation and Proof.

It goes without saying that *concomitant* error as to the quality of the person does not affect the validity of the marriage in any way.

The same is true, *as a rule* and *of itself,* in the case of *antecedent* error. For, given the identity of the person, the essential object of the consent ordinarily subsists, since the consent is directed to the person himself. The quality of the person is, of itself, nothing more than an accidental circumstance and, consequently, the consent is not thereby substantially vitiated (2).

As an *indirect* proof, we may add that if marriage ware invalidated by reason of error as to the quality of the person, this would give rise to continual disputes and prove a source of instability for the institution of marriage itself.

« Marriage remains valid even when one of the contracting parties has been deceived by trickery and fraud ;... this does not render the contract subject to rescission, as in the case of betrothment, because marriage is of its nature indissoluble ; consequently

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1. This error can hardly ever occur, except in marriages by proxy.

2. « Error... as to quality does not exclude consent to the marriage ». PETER LOMBARD, l. IV. *Sent.,* D. XXX, A.

the injury committed must, as far as possible, be repaired in some other way » (1).

It might be objected that the contracting party would not have proceeded with the marriage, if he had known of his error in time. But, as a matter of fact, he did give his consent, and that consent was directed to the essential object of the contract. We have not to inquire what he would have done, but what he actually did. See above, n° 85.

unless exceptionally.

Accidentally and *exceptionally* it may happen that the consent is substantially vitiated in consequence of error as to the quality of the person. This occurs :

a/ When the error as to the quality is *substantial* and *affects the person himself (redundat in substantiam),* i. e., when the physical identity of the one partner is of less importance, in the eyes of the other, than such or such a quality which the former is supposed to possess, so that this identity is, in the mind of the latter, only an accessory circumstance (2).

b/ When the contracting party really makes *his consent dependent,* at least virtually, on the possession of some quality, even though the error does not affect the person (3).

Observe that it is very difficult to prove the nullity of a marriage on the ground of error as to quality, or on the ground of an annex-

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1. Theol. Mechl., o. c., n° 67, qu. 2.

2. Thus according to St. Thomas, *Suppl.*, qu. LI, art. 2, ad 5m : « Si error nobilitatis vel dignitatis redundat in errorem personae, tunc impedit (irritat) matrimonium ; unde si consensus mulieris feratur in istam personam directe, error nobilitatis ipsius non impedit matrimonium ; si autem directe intendit consentire in filium regis, quicunque sit ille, tunc si alius praesentetur ei quam filius regis, est error personae et impeditur matrimonium ». See Gasparri, II, nos 785-790 ; Causa *Limburgen.*, 2 Jan. 1913,in *A. A. S.*,V,p. 46 s. Cf. also Thaner, o. c., p. 36 s., who rejects this view, as we have already said in n° 61.

3. The objection does not hold good, that in case of antecedent error there is always *conditional* consent, because the contracting parties would have desisted had they known their error in time, or would have made their consent depend on the existence of this quality. We have not to inquire what they would have done, but what they really did ; and the interpretative placing of a condition, which would have been placed had the parties thought of it, is not sufficient to make the consent conditional. It is necessary that the condition should have been really placed, at least with a virtual intention. See above, n° 85.

ed condition. In the external forum, such is admitted only with the greatest difficulty (1).

261. *Error of law as to the nature of marriage annuls it,*

II. As to **error of law**, 1. if it bears on the *very nature of marriage* and on the *substantial object of the contract*, it constitutes in the internal forum a diriment impediment, and substantially vitiates the matrimonial consent, whether it be antecedent or simply concomitant. In the external forum, however, such error is admitted only with very great difficulty in the case of those who have attained the age of puberty (2).

but not error as to the properties of marriage.

2. If it bears on *the rights and obligations resulting from marriage* or on one of its *properties*, e. g., on its indissolubility or on the sacramental character of the bond, it does not invalidate the contract, even if it is antecedent, unless it be exceptionally and accidentally, in the two cases indicated under I, 2.

The reason of the *first proposition* is that consent cannot exist, unless its substantial object is known at least confusedly. The reason of the *second* is, that consent given as to the essential object of the contract is considered to be thereby extended to the properties of the same, and to the rights and obligations resulting from it. Ignorance or error, in this connection, is not of itself an obstacle.

This enables us to solve the case of a girl who marries in ignorance or error *as to the use of marriage*, i. e., as to the mutual right and obligation to the conjugal act. This reciprocal right and obligation constitute the substantial object of the marriage contract. This is why the contract is undoubtedly null in the internal forum, if the girl marries without having *even a confused idea* of this right and obligation, and if she looks upon marriage as merely a friendly union, not even knowing that its object is generation.

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1. See the *Causa* given in the *Anal. eccl.*, 1907, p. 239 s., where the principles are very well applied to a case concerning a marriage that a man had contracted because he believed the woman to be enceinte through his fault, when she was not really so. The nullity was admitted by the ecclesiastical tribunal of Avignon, but not by the S. Congr. Concilii. Cf. also the *Causa Baltimoren.*, of 30 June 1910, in the A. A. S., 1910, p. 590 s.; here again the petition met with a check. See lastly the *Causa Cameracen.*, of 11 Aug. 1910 and 23 June 1911; here, the marriage was declared null on the ground that a condition had been placed; however, this declaration was contrary to the decision of the S. Rota at the first hearing. A. A. S., II, p. 961 s. and III, p. 497 ss.; cf. also n° 87.

2. WERNZ, o. c., IV, n° 228.

But if she is, at least confusedly, aware of this right and obligation, and knows that marriage is the union of man and woman with a view to procreation, it does not matter if she has no exact knowledge of the act required for this purpose. The contract is held to be valid, although perhaps, as we have said, the girl would not have consented to the marriage, if she had known distinctly the nature of the conjugal act (1).

The impediment of error is of the natural law.

Note. The impediment of error is *of the natural law,* and as such *is not susceptible of dispensation.* Consequently, for the validation of a marriage that is invalid on this head, it is necessary that the party directly concerned should give *a fresh consent,* when the error and nullity have been discovered, and that the consent of the other party should virtually persevere. If the error is not publicly known, it is sufficient to renew the consent secretly, and this is included in the continuance of cohabitation after the error and the nullity of the former consent have become known. This must be borne in mind in proceedings instituted for the declaration of nullity on the ground of error. See below, nos 408 and 409.

Scholion. Provision of the Code Napoléon.

262. Provisions of the Belgian civil law.

The *Belgian Civil Code* admits error as a cause of *relative nullity* (art. 180), when it affects not a mere quality, even should it be an essential one, but *the person himself,* whether the *physical* person, or, in accordance with jurisprudence, the *civil* person (2). There is error as to the identity of the *civil* person, when there is « a complete change of personality, such that, in consequence of this error, one of the parties has married a civil person, other than that to whom he wished to be united » ; e. g.,when a person has represented himself « as being a member of a family to which he does not belong..., by attributing to himself conditions of origin and of filiation which appertain to another » (3) ; but error as to the age of the person is by no means sufficient (4).

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1. See Van de Burgt-Schaepman, o. c., I, no 93 ; Vlaming, o. c., II, no 448 ; Gasparri, o. c., II, no 791. Observe that if a girl married without knowing precisely in what the conjugal act consists, and if she refused to consummate the marriage, recourse might be had to the dissolution of the marriage ratum non consummatum. For the rest, timely instruction on the duties of marriage will prevent such difficulties. See below, no 335.

2. See Planiol, o. c., I, nos 1061-1065 ; Thiry, o. c., I, n. 226.

3. See the decision given by the tribunal of Paris, in *Le XXe Siècle,* 31 Dec. 1906 ; see also *Le XXe Siècle* of 8 Jan. 1902, and the *Correspondant* of 10 Oct. 1904, p. 33.

4. *Pasicrisie,* 1907, IV, p. 31 s., where is cited the decision of the tribunal of

According to art. 181, a marriage is considered to be revalidated, so that it can no longer be annulled, « whenever there is continued cohabitation for six months, after... the error has been discovered ». See above, n° 243.

Art. 1332-1334 of the German code concern the impediment of error which gives rise to the action called Anfechtungsklage. Cf. ENGLMANN, o. c., p. 335 ss.

ARTICLE 2. The Impediment of Condition.

263. *Meaning of the impediment of condition.*

Definition. *Condition,* as an impediment of marriage, may be taken in a twofold sense : for error as to the servile condition of the partner, and for a suspensive condition annexed to the consent. In the verses given above, « condition » is taken in the former sense, and this is also that which is treated of in l. IV Decr., tit. 9. We, also, shall confine ourselves to that. Concerning condition annexed to consent, see what we have said above, in n°s 85 and following, and what we have just said in n° 260.

Law in force.

264. *Servile condition is of itself an impediment of purely ecclesiastical law.*

Error as to condition is a diriment impediment of marriage, when a free person marries one who is also believed to be free, but is a slave.

This rule is enunciated in l. IV Decr., tit. 9, *De Conjugio Servorum,* especially in cap. 2 and 4 (1). As this error affects only the *quality* of the person, it constitutes an impediment *of the ecclesiastical law alone,* and not of the natural law, unless exceptionally, in accordance with what we have said in n° 260.

The Church can therefore dispense from this impediment, but in practice, its procedure takes another course. When the case occurs, the object is rather to obtain the revalidation of the marriage by the parties themselves, that is to say, through the renewal of consent by the party who was in the first instance deceived ; on the discovery of the error and nullity, the party

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Avignon, of 3 Apr. 1906. See also VAN HEMEL, o. c., p. 17 s., and compare with p. 12 s.

1. « If it is proved that M. has in ignorance married a slave, and that after becoming acquainted with her condition, has accepted her neither by act nor by word,... we ordain that you accord him, in virtue of the apostolic authority, the faculty of contracting marriage with some other free person ». Decree of Innocent III.

originally deceived is induced to renew consent. See the rule laid down in n° 261, and what we have said in n^os 408 and 409 ; cf. also WERNZ, o. c., n^os 243 and 242, note 24.

Scholion.

The ancient law.

Servitude originally constituted for the slave an absolute incapacity to contract valid mariage with a free person, just as natural relationship entails a like incapacity between blood-relations (1) ; subsequently, this incapacity was restricted to the case in which the free person was *ignorant of the servile condition* of the slave (2).

At a still later date, nullity of marriage in such cases was deduced from *the error itself*, rather than from the incapacity of the slave. See ESMEIN, o. c., I, p. 317-335.

From this we can understand why the Decretals treat of servile condition as a separate impediment, while, under the present discipline, it should rather be regarded as appertaining to the impediment of error. Keeping in view the existing character of this impediment, we can also see that it is the consent itself of the free party, that is directly invalid. Finally, since we are dealing with a purely ecclesiastical impediment, it is clear that, if such free party is *unbaptized*, his marriage with a slave, whose condition he is ignorant of, would not be invalid on that ground.

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1. See CHARDON, o. c., p. 266-279, who observes that the diriment impediment was restricted solely to servitude properly so called, i. e., to slavery, and did not affect the *serfs* of the Germanic nations. To them, marriage with a person of different condition, or with one of the same condition but of a different lordship, was merely *prohibited*. These unions were known as *foris-maritagia* or *fors-mariages* (marriages contracted out of doors), and were permitted only with the authorisation of the lord, who in that case received a fine, called the right of *foris-maritagium*. Cf. DE FORAS. o.c., p. 173 ss. ; DU CANGE, *Glossarium*, v° *Foris-maritagium*.

2. This is what PETER LOMBARD says, l. IV *Sent.*, Dist. XXXIV, A : « Fully legitimate are marriages against which there is neither a vow of continency, nor sacred Orders, nor relationship... ; fully illegitimate are those that are prohibited by Orders, relationship, and disparity of worship ; while marriages in the case of servile *condition*... hold a middle place between fully illegitimate and fully legitimate unions ». Hence, according to the *Master of the Sentences*, the marriage of a free person who wishes to marry a slave, is not absolutely illegitimate, since the free person is capable of doing so validly, when he knows of the servile condition of the other ; yet, such a marriage is not fully legitimate, because it is invalid when this circumstance is unknown to him.

Article 3. The Impediment of Insanity.

Law in force.

265. *When insanity constitutes a diriment impediment.*

Insanity constitutes a diriment impediment when, at the moment of the celebration of the marriage, it does not leave sufficient use of reason to understand the substance of the matrimonial contract.

We say « *at the moment of the celebration of the marriage* » : hence, on the one hand, it is not necessary, for the nullity of the marriage, that the madness should be continuous, but it is sufficient that the contracting party should have been deprived of reason at that particular moment(1). On the other hand, marriage contracted by one, whose madness is habitual, is valid, if the marriage took place during a lucid interval (2).

Though such a marriage is valid, we must add that it is *ordinarily illicit,* on account of its deplorable consequences for the parties and especially for their children. It cannot be permitted except for a very grave reason, and after reference to the Bishop (3).

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1. We here suppose that the marriage is contracted in person ; for if it is a marriage *by proxy*, its validity remains unaffected, if, at the moment of its celebration, the principal is suffering from an access of *transient* insanity, provided he has duly entrusted the matter to his proxy ; just as it does not matter, if he should be asleep or intoxicated at the moment that the contract is made in his name. See above, n° 70.

2. Ch. 24, X, IV, 1, compared with the *Glossa*. Observe that by « *lucid interval* », we are not to understand the diminution,or even the momentary cessation of the *signs* of insanity, if the afflicted person has not really recovered the use of reason. For often, as the *Glossa* remarks, « madmen have a tranquil appearance, and seem to have regained their senses, though still of unsound mind ». We are speaking of a real return to reason, however transitory it may be.

It is presumed that there was insanity at the very moment of marriage, if, shortly before or after the contract, the person has given unequivocal signs of habitual madness, even though during the nuptial ceremony he has made no manifestation of his state. See the *Causa Treviren.*, 22 July 1899, in the *Anal. eccl.*, 1899, p. 343 ss. ; and the *Rev. eccl. de Metz*, 1900, p. 122 s. ; the *Causa Parisien.*, 18 March 1905, in the *Canon. Contemp.*, 1905 p. 407 s. ; the *Causa Argentinen.*, 22 Nov. 1907, in the *Anal. eccl.*, 1907, p. 482 s. ; the *Causa Parisien.*, 23 Dec. 1909, in the *Acta Ap. Sed.*, II, p. 121 s.

3. For the same reasons, with due regard to proportion, it is prudent to discourage marriage in the *weak-minded*, though strictly it cannot be forbidden them.

Article 4. The Impediment of Violence and Fear.

266. *Violence or fear constitutes a diriment impediment,*

Meaning. We are not speaking here of physical violence, which has no power over the acts of the will, such as consent ; but of *moral violence,* acting indirectly on the will through fear of some physical or moral evil, present or future ; however, the violence is supposed to be such as to leave freedom of internal consent, and not to upset the person intimidated to such an extent as to take away the use of reason. *Violence and fear* are correlative terms, and what is said of the one, holds good of the other : « Violence is on the part of the person inflicting the fear, and is of an active nature ; but fear is on the part of the person against whom violence is employed, and is of a passive nature » (1).

Law in force.

Violence or fear constitutes a diriment impediment of marriage, at least by ecclesiastical law, if it is, 1. *grave,* 2. *unjust,* 3. *inflicted for the purpose of extorting matrimonial consent.*

Explanation and Proof.

1. We say : **at least by ecclesiastical law.**

at least by ecclesiastical law,

This is beyond dispute, so far as the *ecclesiastical law* is concerned ; it is proved by numerous documents, and especially by c. 14, 15, 21 and 28, X, IV, 1. But it is a *controverted* point, if such a contract is likewise invalidated by the natural law itself.

With Feye, *De Imp.*, nos 138 s., and Gasparri, o. c., II, n° 811, we hold that the negative is *probable,* against Wernz, o. c., n° 266, De Becker, *De Matr.*, p. 65 s. ; Von Ernst, in the *Schweiz. Kirchen-Zeitung,* 1911, p. 36, and Genicot-Salsmans, o. c., II, n. 490, who are of the opposite opinion. As a matter of fact, why should not the consent be left simply voluntary and free, although in a lessened degree ? Rightly, indeed, is the want of that freedom which is required by the natural law *presumed,* but it does not necessarily obtain, and so it cannot be said that the consent is always invalidated by the very law of nature, but rather, there is a reason why, on account of the presumed want of freedom, it should be invalidated by the Church.

Besides, if matrimonial consent is substantially vitiated there-

1. Cf. Schmalzgrubber, o. c., l. IV, tit. I, n. 384.

by, even in the natural law, we see no good reason why this effect should be attributed to *unjust* fear *alone* (1).

The second opinion is, however, supported by c. 14, X, IV, 1 (2), and by the *Instr.* of the C. S. O., of 15 Feb. 1901 (3). But it is to be observed that these documents are not quite clear on this point, and that they may also be understood in the sense that, in such a case, the natural law *urges* the annulling by the positive law of a marriage contracted under the influence of fear. This we readily admit.

2. The fear must be grave.

if the fear is a/ grave,

The positive law plainly says that *only grave* fear has the power to annul marriage, as may be seen from c. 15, 28, X, IV, 1, and the *Instr.* of the C. S. O., of 20 June 1883 *(Collectan.,* n° 1572, n° 35). On this ground, then, the Church invalidates the contract. Those, who make the natural law also intervene, must, *a fortiori,* require a grave fear, since it is evident that the natural law does not annul the consent on account of some slight fear.

Fear is *grave,* when the nature of the threats used, having regard to all the circumstances of those who make them and of those against whom they are made, is capable of extorting consent to marriage, that would not otherwise be given. For this, it is necessary that there should be a question of an evil absolutely or relatively great (4), and imminent : that is to say, that the threats

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1. WERNZ, l. c., and the *Schweiz. K. Z.*, l. c., give as a reason, that unjust fear, not just fear, constitutes an injustice that calls for reparation ; but, they say, as marriage is indissoluble, this reparation would be impossible if the contract were valid.

2. Cf. also the passages brought forward by GILLMANN, *Archiv. f. k. Kirchenr.*, 1912, p. 194.

3. *Anal. eccl.*, 1901, p. 98 s., according to which, the impediment of violence and fear affects the consent, and consequently is based on the natural law itself. On the other hand, the S. Rota, in the *Causa Tunkinen.,* 7 July 1911 *(A. A. S.,* III, p. 633), says that fear is an impediment invalidating marriage *at least of Christians.* See also *A. A. S.,* IV, p. 504, in the *Causa Tarvicin.,* 11 March 1912.

4. For admitting the nullity of a marriage on the ground of violence and fear, the *external forum* takes into account the *subjective* disposition of the person on whom it has been inflicted, but at the same time it requires a certain *objective* gravity in the threats complained of. Thus, the fact that a contracting party had been terrified by the fear of some evil, absolutely light in itself, would not be

should come from one who will carry them out, and that they are not easily avoided (1). It makes no difference, if the evil does not directly menace the contracting party himself, provided it affects one of his near relations, e. g., his father or mother ; nor, again, does it make any difference, if the fear is inflicted by the parents themselves for the real advantage of their children (2).

With special reference to *reverential fear,* which is very frequently invoked in these nullity cases : *purely* reverential fear, which causes a child to consent to a marriage, out of respect and affection, and in order to avoid giving pain to parents and relations, does not *of itself* and *as a rule* constitute a grave fear. Nevertheless, *exceptionally* and *accidentally,* the case may occur, either on account of the peculiar mentality of certain persons, which is taken into account in the external forum, or owing to some attendant circumstance : « namely, threats, blows, importunate and insistent entreaties of parents, or even, where such attendant circumstance is wanting, if the person subjected to fear is apprehensive of paternal indignation as being likely to last for a long time » (3).

3. The fear must be inflicted **for the purpose of extorting consent to the marriage.**

b| inflicted for the purpose of extorting consent to the marriage,

The *reason* of this is drawn from the very object of the invalidating law ; for this is purposely designed to protect the freedom of

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sufficient. See in particular, *A. A. S.*, IV, p. 505 s., in the *Causa Tarvicin.*, already referred to.

1. See the *Instr.* of the C. S. O., 1883, nos 35 and 36 ; GASPARRI, o. c., no 815 s.

2. See the *Causa Parisien.*, 28 Jan. 1899, in the *Anal. eccl.*, 1896, p. 16 ss.

3. From the *Causa Colonien.*, 1 July 1912, in the *A. A. S.*, IV, p. 871. The meaning of reverential fear and its influence on marriage are very well explained in the *R. th. fr.*, 1903, p. 20 ss. See also the following *Causae* : *Parisien.*, 18 June 1898, in the *A. S. S.*, XXXI, p. 205 s. ; *Parisien.*, 28 Jan. 1899, *ibid.*, XXXII, p. 72 s. ; *Valentinen.*, 19 May 1900, in the *Canon. Contemp.*, 1900, p. 372 s. ; *Versalien.*, 19 May 1900, *ibid.*, p. 474 ; *Mechlinien.*, 25 Jan. 1902, *Canon. Contemp.*, 1902, p. 232 ss. ; *Cameracen.*, 16 Aug. 1902, *ibid.*, p. 590 s. ; *Augustudinen.*, 25 June 1904, *Canon. Contemp.*, 1904, p. 605 s. ; *Versavien. et Militen.*, 17 June 1905, *Canon. Contemp.* 1905, p. 581 ss. ; *Parisien.*, 1910, in the *A. A. S.*, II, p. 348 ss. ; *Versavien.*, 21 July 1910, *ibid.*, p. 886 ss. ; *Vercellen.*, 20 March 1911 (*A. A. S.*, III, p. 244 ss.) *Vesprimien.*, 2 June 1911 (*A. A. S.*, IV, p. 108 ss.) ; *Tunkinen.*, 7 July 1911 (*A. A. S.*, III, p. 661 ss.) ; *Lugdunen.*, 28 June 1912 (*A. A. S.* IV, p. 646 ss.)

matrimonial consent (1). Consequently, in strict law, the consent is not held to be forced, unless constraint has really been brought to bear upon it. Some, however, do not require this condition, but in practice their opinion hardly differs from ours. We, too, maintain, and with good reason, that it is enough that fear should have been inflicted *equivalently* for the purpose of extorting consent, and that, in the external forum, it must be considered as having been so inflicted, whenever it has caused acquiescence in a marriage to the advantage either of him who caused the fear, or of one of his relations, if the threats have thereupon ceased.

4. The fear must be **unjust**.

c/ unjust.

We may say at once that fear is never unjust, unless inspired by some free agent. Thus, one might be impelled to marry by the dread of disease or the fear of hell.

We have, therefore, only to consider fear inflicted *positively* (2) *by a free agent*, for the purpose of extorting consent.

The fear is unjust, a/ whenever the person subjected to it, is not bound in conscience to marry (3) (nor even bound to choose between marriage and some other obligation, should such an alternative be imposed) ; *or*, b/ whenever the person inflicting it, has no right to carry out his threats. In other cases, *it is not unjust*, even though there may have been something excessive in the manner of demanding the marriage or of uttering threats, or though some less competent person may have interfered in the matter. Accordingly, the fear would be just, if, under threat of legal proceedings, one gave a seducer the choice of marrying or of providing a proportionate dowry, or if one absolutely required that a man who had seduced a girl, under promise of marriage, should marry her. The fear would be unjust, if it were employed to force a marriage absolutely or conditionally (under the alternative of

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1. Cf. also the *Causa Tunkinen.*, l. c., p. 663.

2. We say : *inflicted positively*, because if a girl, for example, feared the anger of her father and the inconveniences that might result therefrom, without her father having inflicted such fear by any positive act, there would be no reason for taking it into account.

3. See above, n° 18 (note), the obligations of a man with regard to the girl he has wronged.

some other obligation), on a man who had violated a woman with her consent (1).

267. *It is doubtful if the unbaptized are subject to it;* **Corollary I.** From what we have said, it is not *certain* that the *unbaptized* are directly bound by the impediment of violence or of fear; consequently, their marriage is probably not invalid on account of the same, unless the fear was such as to upset reason altogether at the moment of consent, or unless the civil law to which they are subject annuls marriages of that kind.

and if the Church has power to dispense. **Corollary II.** In like manner it is *uncertain* if the Church has *power to dispense* from this impediment; *as a matter of fact,* it never does grant such a dispensation, firstly, beeause it is doubtful if it has the power to do so; and secondly, because it wishes to favour the liberty of marriage.

Marriage contracted invalidly under the domination of fear, cannot, therefore, be *revalidated* otherwise than by causing a renewal of consent to be made by the victimised party. This renewal must be made after the fear has been removed and with a knowledge of the nullity of the former consent (2). It is moreover necessary that the other party should persevere in his consent. This new contract must be made before the Church, if the nullity was public (3); otherwise a renewal made in secret, or even implied in the continuance of cohabitation, is sufficient. See nos 408 and 409.

Finally, observe that the marriage is not to be revalidated, but that it is valid from the first, in a case where agreement has been extorted by grave fear, but where the consent was freely given at the actual moment of celebration.

268. *Right of challenging a marriage on the ground of grave fear.* **Note. 1.** Many matrimonial actions have been instituted for declaration of nullity on the ground of violence and fear, for the most part alleged against parents. Occasionally a definitive judgment is obtained, but generally they are rejected or postponed through want of sufficient proof. However,

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1. See other examples cited by Van de Burgt-Schaepman, o. c., I, no 100, (note); and in *The Ecclesiastical Review*, 1913, p. 181 ss.

2. See the *Causa Osnabrucen.*, 11 Jan. 1912, in the *A. A. S.*, IV, p. 186.

3. According to the *Causa Vesprimien.*, in which a marriage was declared null after 20 years of cohabitation, without the S. Rota showing any concern about the possible private renewal of consent. The case of intimidation was one of public notoriety, and therefore the convalidation ought to have been made in legal form. See *A. A. S.*, IV, p. 115 s.

in case of doubt, and where it is certain that the marriage has not been consummated, a dispensation from marriage *ratum non consummatum* is ordinarily granted.

As to the *right of challenging* a marriage, the *Instructio* of 20 June 1883 (*Collectan.*, n° 1572) n° 35, decrees that : « no person is permitted to challenge a marriage on this ground, except the one who has been subjected to the violence and constraint ; and that moreover, such a one would experience a refusal, if he had already continued for a considerable time in the marriage without protesting, provided that the liberty and opportunity for doing so were not wanting. In other words, if, after his fear was removed, he remained of his own will in the conjugal abode and did not refuse the duties of marriage, his petition would not be entertained ». See below, n° 340.

2. Under *pain of excommunication*, still in force at the present day, the Council of Trent, Sess. XXIV, c. 9, *De Reform. Matr.*, forbids « all persons of whatsoever degree, dignity or condition, to employ constraint in any way whatever, whether directly or indirectly, against those subject to them or against any other person, so as to prevent them from contracting marriage freely ». On this provision, see De Brabandere-Van Coillie, o. c., II, p. 836 s. ; *N. R. th.*, XV, p. 552 ss. ; Esmein, o. c., II, p. 255 ss. *Penalties against those who inspire such fear.*

Scholion. Provisions of the Code Napoléon.

269. *Provisions of the civil code.*

Art. 180 declares null, in civil law, every marriage extorted by violence and fear ; and jurists generally hold that this means a fear *unjustly inflicted* (1). They apply here also the provisions of articles 1111 and the following, according to which violence is a cause of nullity of the contract, although it has been exercised by a person other than that for whose advantage the agreement was made ; and that, not only when it has been exercised against the contracting party himself, but also when it has been brought to bear upon his relations. We may add that only *grave* fear is recognised, and that purely reverential fear has no place here (art. 1114).

In virtue of art. 181, « a petition for nullity cannot be entertained, whenever there has been continued cohabitation for six months after the party has obtained full liberty » ; see above, n° 243.

Article 5. The Impediment of Abduction.

Observation. We reckon the impediment of *abduction* among the diriment impediments *founded on the want of consent*, because it has

1. It gives rise to a *relative* nullity, as is shown by the very wording of art. 180. See above, n° 243.

been established principally for the safeguarding of the liberty of consent, and on account of the presumption of the universal danger of insufficient consent.

No doubt the Holy See set up this impediment partly also « in detestation of so great a crime », as stated in the *Instructio* of 1901 *(Collectanea,* n° 2101). But this is quite a secondary reason. This is proved by the fact that, when the abducted woman has been restored to a place of safety, and the freedom of consent is no longer endangered, the impediment ceases at once, though the crime remains (1).

Abduction is of two kinds : *abduction by violence* or abduction strictly so called, when the woman is carried off against her will ; and *abduction by seduction (elopement),* or as it is styled *raptus in parentes,* when the young lady is taken away with her own consent, but against the will of her parents.

Law in force.

270. *Abduction by violence constitutes a diriment impediment.*

Abduction by violence, that is to say the act of carrying off a woman by force from one place to another, with the intention of marrying her, is a diriment impediment of marriage as long as the person carried off remains in the power of her abductor.

Explanation and demonstration.

1. The Council of Trent, Sess. XXIV, ch. 6, *De Reform. Matrim.*, formally established this point, decreeing that « between the abductor and the woman abducted... there can be no marriage ». That it is here a question of *abduction by violence alone,* to the exclusion of abduction by seduction, is clear, in the first place, from the provisions of the same Council, of which we shall speak under 2., and, in the second place, from the doctrine held by the Tridentine Fathers on the subject of parental consent, as not being requisite for the validity of marriage (2).

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1. It was otherwise with the *impedient* impediment of abduction formerly obtaining, which, *in punishment of his crime,* forbade any marriage whatever to him who carried off the fiancée of another. This impediment continued to exist even after the person had been restored to a place of safety. Cf. ch. 34, C. XXVII, 2. See above, n° 242, and below, n° 272.

2. See KÖSTLER, o. c., p. 158 s. ; WERNZ, o. c., n° 284 ; and in the contrary sense, the *Conférences de Paris,* o. c., t. II, p. 351 ss.

We have seen above, in n°s 226 and 250, how the kings of France, in the 17th

But in order that abduction by violence may constitute a diriment impediment of marriage (1), the following conditions are required : a/ It must be the carrying off of a *woman* : the kidnapping of a man does not constitute an impediment ; but the carrying off of any woman *whatever* invalidates the marriage, provided the other conditions are fulfilled, even though it be a question of a woman leading a bad life, or of the proper fiancée of the abductor. b/ The abduction must take place *for the purpose of marriage*. This is shown by the Roman rescripts which, in speaking of this matter, say : « provided the woman has not been carried off *with this intention* ». Thus, for example, abduction with a view to violation does not suffice. c/ The person must have been removed *from one place to another* : otherwise there would be no carrying off or abduction, but an act of sequestration. Observe, however, that a very short distance is sufficient, provided that the woman has been taken from a place of safety to one that is not safe for her. d/ Finally, the abduction must be made *by violence* : it is necessary that the woman should have been carried off *against her will*, and consequently *by force or by fraud*.

In virtue of this last condition, it is necessary and sufficient that the person should not consent to her *removal*, or at least to her removal *with a view to marriage*. In other words, it is necessary and sufficient, either that she be carried off by force or fraud, though perchance she may already have consented to the marriage or have contracted betrothment ; or, if she spontaneously consents to the abduction, that she should be opposed to its being done with a view to marriage, that is to say, that she should have been deceived into believing that she was carried off for some other purpose, and that she should have been subsequently detained against her will in a place not safe for her, with a view to marrying her.

But if the girl, though flattered into doing so, has consented to

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and 18th centuries, endeavoured to fix on abduction by seduction an invalidating power, that so they might claim the nullity of a marriage contracted by minors without the consent of their parents.

1. We leave out of consideration those elements that make abduction a specific offence, liable to particular penalties. We treat the question here solely from the standpoint of a diriment impediment of marriage.

her abduction with a view to marriage, there is then no abduction by violence, but only *abduction by seduction* against the will of her parents.

This abduction by seduction, as we have said, does not constitute an impediment to marriage ; nevertheless, in the case in which a girl *under age* has been carried off against the will of her parents, without there having been any previous *overtures* or *betrothment* between her and her abductor, there exists, *in the external forum*, a presumption against her free consent to the abduction with a view to marriage, and the existence of the impediment is presumed (1).

The impediment lasts as long as the abducted person remains in the power of the abductor.

2. The impediment continues to exist « *as long as the abducted person remains in the power of the abductor* ».

These are the precise terms of the Council of Trent (l. c.), which explains and confirms the same when it says: « that if the abducted woman, being separated from her abductor and restored to a place of safety and freedom, consents to take him for her husband, the abductor can marry her ».

Thus, on the one hand, this impediment falls of itself, as soon as the abducted woman has been restored to a place of safety and freedom (2) ; and, on the other hand, it continues to exist as long as she remains in the power of her abductor, even when she has given a perfectly free consent to marriage ; whence the *difference between the impediment of abduction and that of violence and fear*, is clearly apparent. The impediment of abduction may coexist with free consent, but not the impediment of violence and fear (3).

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1. This presumption is susceptible of proof to the contrary *(juris tantum)* and is not incontrovertible *(non juris et de jure)*, so that the external forum admits the validity of the marriage,as soon as it is proved that the girl has given her consent. KÖSTLER (o.c., p.159 s.) is, therefore, at fault, when he sees in this practice of the Church, an opposition to the principle of the Council of Trent, which proclaims the validity of marriage independent of the will of the parents.

2. Nevertheless the parish priest would be well advised, before assisting at the marriage of such a woman, to refer the matter to the Ordinary, to whom it belongs to decide if the place in which she is at the time, is sufficiently safe for her.

3. The Council of Trent thought it right to introduce this discipline, as we have said above, for the protection of freedom of consent, because while the girl remains in the power of her abductor, there is reason to fear that her acquiescence may be coerced and extorted.

271. *The impediment of abduction does not bind the unbaptized;*

Corollary I. The impediment of abduction, being *of the ecclesiastical law* only, does not *directly* bind the *unbaptized*, but only the faithful. It nevertheless binds the former indirectly, when one of the contracting parties is baptized, whether that party be the abductor or the abducted (1).

and the Church can dispense from it.

Corollary II. Since the impediment of abduction is of the ecclesiastical law, the Church can *dispense* from it, apart from the impediment of violence and fear. It can accordingly permit the abductor, to contract marriage validly and lawfully with the abducted woman, on her freely consenting thereto, before she has been restored to a place of safety. But it is rare that such a dispensation is granted, and still more rare that the power to dispense from this impediment is delegated (2); moreover, the offence of abduction is so hateful to the Holy See that, in giving a dispensation from *other impediments*, or in granting power to dispense, it ordinarily requires, as a condition for the validity of the rescript, or for the valid use of the faculty, that the woman should not have been abducted (3); and this condition is not considered to be fulfilled by the fact that the abducted woman has been restored to a place of safety: it is enough that she should have been abducted (4). It is there-

1. If the abductor is the baptized party, it is evident that he is directly bound by the impediment, and that the non-baptized party is indirectly bound through him; if the victim is the baptized party, it is then she who is directly affected by the impediment, since it was established for the purpose of protecting the liberty of such persons, and consequently, she is incapable of contracting a valid marriage with her abductor, even though he be unbaptized. See WERNZ, o. c., nº 279.

2. Nevertheless, this delegated power is not excluded from the very wide faculties granted for marriages *in extremis*. In this case, it would generally be difficult to restore the abducted woman to a place of safety. See also the *Instructio* of the C. S. O., of 15 Feb. 1901, in the Collectanea², nº 2101; compare with WERNZ, o. c., nº 285; GASPARRI, o. c., I, nº 560 and SICA, o. c., p. 359.

3. Also in the *Quinquennial Faculties* granted by the S. C. de P. F. to the Bishops of Belgium, and to the Bishops of England, it is stated that dispensations cannot be granted in virtue of an indult, except with the clause: « provided that the woman has not been abducted (with a view to marriage), or, if she has been, that she is no longer in the power of the abductor ». This clause does not occur in certain extraordinary indults and, where it is omitted, it is not implied. Cf. *Collectanea*, nº 1268, coll. VICTORIUS AB APPELTERN, o. c., p. 182 s.; SICA, l. c., p. 359; GASPARRI, o. c., nº 560.

4. See WERNZ, o. c., nº 640, note 209; VAN DE BURGT-SCHAEPMAN, o. c.,

fore necessary to state in the supplica if the woman has been abducted, even though she be at the time in a place of safety (1).

272. *Penalties against abductors.*

Note. The Council of Trent, l. c., declares that « the abductor, and all who give him counsel, succour or favour, are by the very fact excommunicated, branded with perpetual infamy, made incapable of all dignities, and, if they be clerics, degraded from their proper rank ».

These penalties are applicable only to that abduction *which constitutes an impediment* (2), and not to the rest, such as abduction by seduction, or abduction by force for the gratification of ill-regulated passions (3).

The ancient discipline.

Scholion I. In former times, without taking into account the prohibition that prevented the abductor of another's betrothed, from marrying any person whatever (c. 34, C.XXVII,2 ; see above n° 242, and the note to n° 269), *abduction by seduction* constituted an impediment to marriage, and in most countries even a diriment impediment (4). We have already spoken of that above, in connection with the absence of parental consent. Then, again, there was a time when, in some countries, a diriment power was attributed to abduction by violence, while in others it did not constitute an impediment distinct from that of violence and fear (5).

At a later date, towards the end of the twelfth century, especially under the influence of Peter Lombard and of the University of Paris, these two

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n° 117 ; GASPARRI, o. c., n° 561, who insist on this strict interpretation of the clause ; which we admit, when there are inserted in the text the words « dummodo mulier rapta non fuerit », or, « dummodo mulier rapta non fuerit *et*, si rapta fuerit, in potestate raptoris non existat » ; but we have great doubt about it when, in the second clause, *vel* occurs in the place of *et*.

1. Then the rescript of dispensation ordinarily makes the following stipulation : « *After N. has given the said M. a dowry that is in your opinion sufficient, and on condition that M. has been separated from the said N. and put in a place of safety and freedom, that she consents to take the said N. for husband..., and that, if N. survives M., he shall remain for ever deprived of all hope of a new marriage* ». GASPARRI, o. c., n° 561. This prohibition of remarriage, derived from the ancient prohibitive impediment, is not diriment, and a dispensation from it is easily obtained.

2. These penalties remain even after the impediment has come to an end through the restoration of the woman to a place of safety.

3. As to the penalties incurred in cases in which the abduction is not an impediment, see X, V, 17.

4. See above, n° 250, were we have observed that in the ancient Germanic law, abduction by seduction did not entail the invalidity of the marriage, but rendered it illicit and less legitimate ; in the sequel, the Church added thereto the sanction of nullity.

5. See KÖSTLER, o. c., p. 121 s., and p. 165.

kinds of abduction lost the character of an impediment, or at least of a diriment impediment, as the decretals of Lucius III (1181-1185) and of Innocent III (1190-1216) plainly show (1).

Finally, the actual law regarding abduction by violence, such as we have shown it to be, was established by the Council of Trent.

Provisions of the civil code.

Scholion II. In the Code Napoléon, abduction does not constitute a distinct impediment to marriage (2); it nevertheless incurs, under certain determined conditions, various penalties indicated in articles 368-371 of the Code Pénal. Moreover, art. 340, entirely remodelled by the law of 8 April 1908, declares that, in case of abduction, « la recherche de la paternité est admise ». See what we have said above in n° 149.

Second Series.

Diriment impediments based on the incapacity of the persons.

Observation. We shall treat first of the impediments that result from *bodily* incapacity, viz., age and impotency; then of the impediments that result from *legal* incapacity. These are either *absolute*: previous and existing marriage *(ligamen)*, vow, and Orders; or *relative*. In the case of these latter, the incapacity may come either from too great a difference between the parties, which is the case with disparity of worship; or from too close a connection, as in consanguinity, affinity, public decency, spiritual and legal relationship; or finally, from some fault, as in the impediment of crime.

Article 1. The Impediment of Age.

Law in force.

1. *Marriage contracted between two persons, of whom one at least has not yet attained the use of reason, is null in the natural law*; 2. *marriage contracted between persons having the use of reason, but of whom one at least has not yet attained the age of legal puberty, except in the case in*

1. See respectively cc. 6 and 7, X, V, 17. Cf. also above, n° 250.

2. In certain circumstances, notably in the case of abduction by violence, it may very well entail an impediment, but it does not constitute a *distinct* impediment.

which precocity supplies the defect of age, is null in the ecclesiastical law.

Explanation and Proofs.

273. *The want of discretion invalidates marriage in the natural law ; the want of legal puberty invalidates it in the ecclesiastical law,*

1. The first assertion is evident. If the use of reason is wanting, the consent required in the natural law for the validity of marriage, will also necessarily be wanting.

2. *Legal puberty*, according to the canon law, which has adopted herein the provisions of the Roman law, is attained at fourteen years of age complete for males, and at twelve years of age complete for females (1) ; but, in our northern countries, this legal puberty is in advance of the *natural* or *physiological* puberty, which consists in the actual power to procreate (2).

As soon as the contracting parties have reached the age of legal puberty, marriage is *valid and licit* before the natural and the ecclesiastical law, although one of the parties, or even both, may not yet be physiologically puberal. In this case, however, the *use* of marriage is forbidden them, until they have both acquired the actual power to procreate.

On the contrary, before the above-mentioned age, marriage is valid in the natural law (3), supposing that there is sufficient use of reason, but null *in ecclesisatical law ;* since the Church has set up the incapacity on the presumption of actual impotency in the matter of procreation.

This presumption is *juris tantum* and not *juris et de jure,* that is to say, it is not incontestable, but admits of proof to the contrary. Consequently, the marriage is not invalid, when the party who is legally in a state of impuberty, has certainly already attained to natural or physiological puberty ; in other words, where, in accordance with the common expression, precocity supplies the want of age (4).

except when precocity supplies the want of age.

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1. The years are to be reckoned according to the solar days, and must be full and complete, saving the restriction spoken of by the *N. R. th.*, 1903, p. 664, in note, viz., that the last day begun may be considered as complete,at least where it is a question of deciding the validity of a marriage already contracted.

2. As to the average age of puberty in different countries, see WERNZ, o. c., nº 311, note 6 ; BROUARDEL, o.c., p. 126 ss., and p. 158 ss. ; SCHULZE, o.c., p. 749 s.; STÖHR, o. c., p. 498.

3. Actual impotency for procreation does not matter in the natural law,provided it is not perpetual.

4. See cc. 2 and 14, X, IV, 2 ; c. 1, in VIº, IV, 2, and the verses quoted in nº

274. *Marriage null through want of puberty is revalidated only by renewed consent;*

Note. 1. The impediment of ecclesiastical law, resulting from the want of legal puberty, disappears of itself in course of time; nevertheless, a marriage that is null on this ground is not thereby revalidated. It is necessary that the party concerned should, after having knowledge of the nullity, *renew his consent* (1), and that he should do so before the Church, if the nullity was publicly known.

it no longer has the force of betrothment.

2. Marriages celebrated invalidly on account of impuberty, formerly had the force of betrothment, at least if they were not contracted clandestinely in a country in which the Tridentine decree had the force of law. At the present time, this is no longer applicable to persons subject to the new discipline of the Decree *Ne Temere*. See above, n° 9.

275. *Absence of puberty is not an impediment for the unbaptized.*

Corollary I. The impediment of age, in so far as it implies want of discretion, is an impediment of the natural law, and consequently affects even the *unbaptized*. But considered simply as the absence of puberty, it is merely an ecclesiastical impediment, and so does not directly bind the unbaptized, but only the baptized. It follows from this, that marriage is valid between two unbaptized persons who have reached the use of reason, but not the age of puberty; the same is true of them, when one has reached the age of puberty and the other has not (2).

The Church can dispense.

Corollary II. It also follows from what has gone before, that the Church (i. e., the Sovereign Pontiff) (3) *can dispense* from the impediment of age, when this results from the absence of puberty,

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242, where one in a state of impuberty is said to be incapable of marriage « *ni forte potentia suppleat annos* ». This precocity is not presumed, but it must be proved, and as the matter concerns the external forum, it must be submitted to the judge of the external forum, i. e., to the Ordinary. On the signs of puberty, see ESMEIN, o. c., I, p. 213; BROUARDEL, l. c.

1. See below, nos 408 and 409. According to c. 1, in VIo, IV, 2, this consent *is presumed*, with an incontestable presumption *(juris et de jure)*, when « by the consummation of the conjugal act, or by some other means, there is evident proof that the contracting parties have arrived at the time of puberty while still persevering in their consent ». We have here a kind of *presumed marriage* that, as we have said above in n° 92, may yet be met with, so far as the law of clandestinity presents no obstacle to it.

2. See the decrees of the C. S. O., of 28 June 1865, in the *Collectan.*, n° 1370, and of 18 March 1903, in the *R. th. fr.*, 1903, p. 661 s.

3. BENEDICT XIV, Constit. *Magnae Nobis*, 26 June 1748.

and supposing that the parties have attained the use of reason ; but not from the said impediment, when this is due to the want of discretion (1).

Scholion. Civil legislation (Belgian).

Provisions of the civil law.

Art. 144 : « L'homme avant *dix-huit ans* révolus, la femme avant *quinze ans* révolus ne peuvent contracter mariage ».

Art. 145 : « Néanmoins il est loisible à l'Empereur (au Roi) d'accorder des dispenses d'âge pour des motifs graves ».

Art. 185 : « Le mariage contracté par des époux qui n'avaient point l'âge requis, ou dont l'un des deux n'avait point atteint cet âge, ne peut plus être attaqué 1° lorsqu'il s'est écoulé six mois depuis que cet époux ou ces époux ont atteint l'âge compétent (2) ; 2° lorsque la femme qui n'avait point cet âge a conçu avant l'échéance de six mois » (3).

Up to 1792, the civil law in France followed the age fixed by the canon law ; but from that date, it fixed the age at 18 and 15 years respectively. In the German Code of 1900, a girl is held to be of marriageable age at sixteen, and a man only on attaining his majority or emancipation, and no dispensation can be obtained. See Crétinon, l. c., p. 163. In the new Swiss Code, the age for marriage is advanced to eighteen years for both sexes.

Article 2. Impediment of Impotency.

276. Meaning of impotency.

Impotency is *the want of intrinsic (per se) aptitude for generation.* This want of aptitude may be understood *in two ways*, according as one looks at it in the light of aptitude that is *perfect* or *simply* so called, or in the light of aptitude that is *imperfect* or « *secundum quid* ».

There are, in fact, persons who are *absolutely apt* for generation, uniting in themselves all the natural qualities requisite for this purpose. And there are others who are *imperfectly* apt, but yet so *in*

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1. See, however, in the *Theol. Quartalschr.*, Tübingen, 1904, p. 556-575, an instance of a dispensation granted in 1160 by the papal legates, in favour of a marriage between the son of the king of England, aged seven, and the daughter of the king of France, aged three years. The explanation of this is, perhaps, that the legates approved the marriage concluded by the parents in the name of the children, and considered it as *conditionally* ratified ; that is to say, on condition that the interested parties freely gave their own consent at a later date.

2. The marriage is then considered to be revalidated. See above n° 243.

3. This is then a sign of precocity supplying the want of age. *Ibid.*

a certain degree, and « *secundum quid* ». That is to say, they are apt, at least, for the right exercise of the sexual act, for normal relations, which, *taken by themselves,* and *of their nature,* are proportioned to their end, in conformity with the notion given in n° 125.

If, then, we look at the matter from the point of view of *imperfect aptitude,* we must put away the idea of impotency, when there is the possibility of establishing conjugal relations. This possibility supposes on the part of *the man* : a penis capable of erection, testicles, and a duct properly connecting with the urethra. On the part of *the woman* : a vagina admitting of penetration. Cases of impotency, from the same point of view, will be in the case *of the man* : absence of the penis (1), anaphrodisia (2), aphrodisia (3), excessive size of the penis, absence of the testicles (4), the cutting

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1. There is a sect in Roumania, known as the sect of the Skopsky, the members of which cut off the testicles, and even the penis. Cf. BROUARDEL, o. c., p. 27 s.

2. Anaphrodisia is the want of erectability of the penis, a defect rendering the normal sexual act impossible. This frigidity is ordinarily of a pathological nature, though it may arise from other causes. Thus a feeling of fear, coming from without, or even due to autosuggestion, or want of affection for the wife, may give rise to it. Formerly anaphrodisia was commonly attributed to witchcraft. See above, n° 116 ; ESCHBACH, *Disputationes,* p. 148 s. ; BROUARDEL, o. c., p. 118 s. ; BOUVIER, *Dissert. in IV Decalogi praeceptum,* p. 135 and 139 ; ANTONELLI, *Medicina Pastoralis,* II, p. 117 s. ; FRANZ, o. c., p, 178 s. ; ESMEIN, o. c., I, p. 242 s. ; this last treats the question at length.

3. Aphrodisia is an exaggerated excitability, which provokes the *ejaculatio spermatis ante intromissionem virgae.* See SURBLED, o. c., t. II, p. 142 s.

4. The term *spado* signifies, in general, one who is without virility, and, in particular, one in whom the testicles are wanting, either owing to a natural defect or to a surgical operation ; while a *castratus* is one whose testicles have been removed by an operation (cf. FORCELLINI, *Totius Latinitatis Lexicon,* under *Spado*). Some authors make a further distinction between two kinds of eviration ; one, in which the testicles alone are removed, and another, in which the entire membrum virile is amputated ; those who have undergone the former operation they call *castrati,* and those who have undergone the second operation, *eunuchi.* Cf. WILHELM, *Beseitigung,* p. 10 s.

Persons castrated in manhood, are sometimes still capable of true emission of the sperm, in the very first acts of sexual intercourse after the removal of the testicles. The seminal vesicles then definitively empty themselves (see BROUARDEL, o. c., p. 121 s.). But they remain, sometimes at least, capable of erection and penetration. Cf. supra, n° 54 ; WILHELM, *Beseitigung,* p, 34 ; FERRERES, in *Razon y Fe,* t. XXXII (1912), p. 223, in o. c., n. 172 ss., and in the *Eccles. Review,*

or interruption of the twofold vas deferens or duct (operation of vasectomy) (1), or any infirmity which renders physically impossible either the *intromissio virgae*, or the *ejaculatio spermatis in vaginam* (2). There is no impotency in the case in which sperm is simply infecund, devoid of spermatozoids, as is often the case with old men. In the case of *the woman*, impotency comprises the following : the deficiency of the vagina, its excessive narrowness *(arctitudo)*, and vaginism (3) ; but not ovariotomy, nor oophorectomy or fallectomy (see n° 143).

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t.XLVI, p. 216 ss. The absence of testicles must not be confounded with cryptorchidia, where the testicles exist, but are hidden in the interior of the body.

See the well known Constitution of Sixtus V, *Cum frequenter*, of 27 June 1587, which declares eunuchs incapable of contracting marriage.

1. Nimirum vasectomiam passi, quousque in illo statu manent, non secus ac castrati, incapaces esse videntur, post evacuationem vesicularum seminalium, ad emittendum verum semen virile, siquidem omnis communicatio cum testiculis semen elaborantibus est abrupta. Possunt quidem hi sicut et illi servare erectibilitatem virgae et vaginam penetrare, ac imo liquidum quoddam ejaculare, sed hoc liquidum non esse videtur verum semen, sed humor aliquis aquosus a glandula *prostata* vel aliis secundariis glandulis secretus. This thesis we have proved at greater length in the *Collat. Brug.*, t. XVII, p. 536 ss., where we also appeal to the Constitution of Sixtus V, already quoted. From among the authors mentioned under n° 225b, it is supported by De Becker, l. c. ; Ferreres, ll. cc. ; Rigby ; Stucchi ; Eschbach ; Capello ; also by Day, o. c., p. 58-75 and Ojetti, *Synopsis*, n° 2425, Among its opponents are Donovan (though with some hesitation) ; Labouré, and especially Gemelli and Dr O'Malley, *Ecclesiastical Review*, t. XLIV, p. 691 s., where he says that by vasectomy no greater impotency is induced than by shaving off the beard. Compare t. XLVI, p. 219 ss. and 332 ss. ; t. XLVIII, p. 213 ss.

2. This infirmity occasionally occurs, in cases of hypospadias and epispadias, when the orifice of the penis is situated at its root ; either on the upper surface (epispadias) or on the lower surface (hypospadias). See Brouardel, o.c., p. 125 s. and p. 103.

3. Vaginismus est in hyperesthesia vulvae omnem coitum impediente. Cf. Brouardel, o. c., p. 143. Hujusmodi infirmitas constituit mulierem impotentem. Ad potentiam namque non est satis quod vir possit applicare virgam ad exteriorem partem *vulvae* ibidemque deponere semen : potest quidem exinde sequi foecundatio, favore motus vitalis quo gaudent spermatozoida ut sponte vaginam penetrent ; ast id non sufficit, sed requiritur ut foecundatio obtineri possit via normali, per copulam scilicet. Ad hoc autem postulatur penetratio corporis foeminei, non quidem perfecta, ita ut in tota longitudine penetretur vagina, sed tamen aliqualis penetratio corporis est necessaria, quam prorsus excludit descripta infirmitas. Dubitari posset utrum sufficiens detur penetratio possibilis,

If, on the other hand, one looks at the matter *from the point of view of perfect aptitude*, and if this is held to be necessary, *in addition* to those already mentioned, we must regard as impotent all such as are capable of normal sexual relations, but are wanting in some one organ or element, foreign to the sexual act itself, but indispensable for fecundation. Such are women who want both ovaries, and those who have undergone the operation of bilateral oophorectomy (1).

The two theories which we have just explained have each their supporters. Whichever one adopts, impotency is *anterior* or *posterior* to marriage, according as it began before or after the matrimonial contract. It is, moreover, *absolute*, if it prevents relations with any person whatever, or *relative*, if it concerns only certain persons. Thus a man, by reason of his frigidity or the abnormal proportions of his genital organs, may be quite impotent with regard to one woman, and not so with regard to an-

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adeoque possibilitas copulae et potentia, quando vir potest penetrare *vulvam*, usque ad orificium vaginae, non autem ipsam *vaginam*, deposito semine, absque ulteriori penetratione, ad introitum *vaginae*. Cf. Van de Burgt-Schaepman, o. c., I, n. 204; Wernz, o. c., n. 342, sub 4; Ballerini-Palmieri, o. c., n. 1270, in nota.

1. Ad haec melius intelligenda juvat notare, in procreationis oeconomia haec *duo* esse distinguenda. *Primo* habetur *coitus* seu *copula*, qua nempe vir penetrat corpus mulieris et semen in ea infundit: ad hoc *in viro* datur *penis* seu *virga* erectibilis, ad corpus foemineum penetrandum, et dantur *testiculi*, ad elaborandum semen, seu liquidum foecundantibus spermatozoidis refertum, quod sperma per canale deferens deducitur ad vesiculas seminales et, sub influxu venereae excitationis, ejaculatur per virgam; *in muliere* correspondet organum penetrabile, *vagina* dictum, i. e. canale flaccidum ab exteriori parte ad interiora ducens, et seminis ejaculandi receptivum.

Praeterea habetur *ipsa foecundatio*, per conjunctionem scil. spermatozoidum cum ovulo foemineo: ex una scil. parte, spermatozoida, copula peracta, spontaneo vitali motu intimius penetrant corpus mulieris, et e vagina ingrediuntur uterum seu matricem ad quam vagina aditum praebet, vel etiam ulterius adhuc penetrant; ex alia autem parte descendit e penetralibus mulieris ovulum seu elementum foecundandum, procedens ab ovariis, i. e. a binis organis, ovula conficientibus et ex utroque latere uteri existentibus, ad uterumque relegatis ope duplicis conducti (tubae Fallopianae): foecundationem autem producit utriusque elementi conjunctio, elementi nempe activi (spermatozoidis) et elementi passivi (ovuli foeminei).

other (1). A distinction is also made between *organic* or anatomical impotency, and *functional* impotency. The former has its origin in some structural defect ; the latter is due to some functional fault, almost always of a pathological nature, as is ordinarily the case in anaphrodisia, aphrodisia and vaginism. This distinction is, however, of less importance for us.

Impotency is said to be *perpetual,* when it is incurable, or when only a miracle, or means altogether extraordinary (2) or very dangerous or unlawful (3) can remedy it. It is *temporary* in the contrary case ; but then there is not, properly speaking, real impotency (4).

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1. Formerly, relative, and sometimes also absolute impotency, were popularly attributed to witchcraft. See *Conférences de Paris,* III, p. 111 s.

2. With regard to those who have undergone the *operation of vasectomy* : it seems that their state can be remedied only by means that are altogether exceptional, consequently their impotency must apparently be reckoned as *perpetual.* It is true that there is a physical possibility of re-establishing communication between the testicles and the seminal vesicles, by stitching together again the severed extremities of the duct, and cases are quoted in which such an operation is said to have been successfully performed ; but it cannot be denied that, considering the want of the light and the smallness of the interior diameter (1/2 millim.) of the duct, a restoration of this kind is extremely difficult, and not only requires an experienced hand, but is rarely successful, especially when the operation of vasectomy has not been quite recently performed. Cf., in particular, Ferreres, o. c., n. 69-75 and n. 218-226, where he quotes medical authorities.

Nevertheless, since in a matter of this kind, that is of such great moment and at the same time so essentially practical, exceptional prudence is required, and since the solution depends so much on the advancement of surgical skill, until the matter has been settled by a decree of the Holy See, we are unwilling to deny probability to the other opinion, that holds the impotency to be only temporary. Cf. *Collat. Brug.,* t. XVII, p. 541 s.

3. Thus to counteract witchcraft by witchcraft was deemed unlawful, and logically so. See *Conférences de Paris,* III, p. 112 s. ; Kutschker, o. c., III, p. 41 ss.

4. Impotency due to hypospadias, may sometimes be remedied simply by adopting a different position in effecting conjugal relations. See Stöhr, o. c., p. 502. If the impotency can be removed by an operation that presents no danger, e. g., in the case of narrowness *(arctitudo)* that can be easily remedied, the impediment cannot properly be called perpetual ; nevertheless, the party in question apparently is not bound to submit to an operation, and in that case the Holy See readily grants a dispensation from the marriage *ratum non consummatum.* Cf. Schnitzer, o. c., p. 352, in note.

II. Rules in force.

277. *In natural law,*

FIRST PROPOSITION. *In natural law, impotency, whether absolute or relative, constitutes a diriment impediment when it is anterior to marriage and perpetual.*

Proof.

impotency is a diriment impediment to marriage,

1. *Intrinsic aptitude for generation,* at the very least, imperfect aptitude, that is to say, aptitude for the sexual act, is required in the natural law for the validity of marriage. The very nature of marriage and its proper end show this. Marriage is, in fact, a contract whereby a man and a woman are associated and united as a common principle for the procreation and education of children. To beget children and to educate them, that is the proper end and object of the contract. It is evident that such a contract must be capable of making for this end ; and consequently the contracting parties must have, at the very least, a certain aptitude for it. (See above, n^os^ 48 and 53).

when it is perpetual and anterior to marriage.

2. It is quite clear that only *perpetual* impotency is an insurmountable obstacle ; for it alone is in absolute contradiction to the end of marriage. *Temporary* impotency admits of a remedy.

Moreover, the impotency must be *anterior* to the matrimonial contract ; for impotency supervening during marriage, in no way dissolves the marriage, though it renders the use of it unlawful.

Finally, it matters little whether the impotency be *absolute* or *relative.* Only in the former case it constitutes a diriment impediment to any marriage whatever ; while in the latter, it affects only those who are impotent in relation to one another.

278. *Cases of complete inaptitude alone fall under the impediment of impotency.*

SECOND PROPOSITION. *A doctrine theoretically probable and practically certain maintains that the diriment impediment of impotency concerns only cases of complete inaptitude, and that it consequently affects only such as are incapable of normal relations, that are, of their nature, and taken in themselves, adapted to generation.*

Explanation and proof.

A. This theory is **speculatively probable.**

This theory is speculatively probable,

For, 1. The matrimonial *contract* involves a mutual transference of rights and a mutual acceptance of duties. Such is, so to speak, the *object* of this contract. This mutual transference and acceptance

are not made with a direct view to fecundation, but with a view to sexual intercourse of such a kind as to be, of its nature, and as such, fitted for generation. The contract that opens the way to this is therefore valid.

If we look at the *end* of marriage, the procreation and education of children are alone to be taken into account ; this is why every lawful marriage must be objectively ordered to this end. For that, it is only necessary that the relations should be, as such, and taken in themselves, fitted for generation.

Moreover, the *use of marriage,* too, becomes *lawful* as soon as sexual intercourse can be rightly effected, since it then, of its nature, tends to its end ; and that is the touchstone of legitimacy. In order that an act may be lawful,it is not necessary that it should be absolutely certain to attain its proper end ; it is enough that it should be *of its nature* adapted to that end, and that it should tend to it *as such.* See above, nº 125.

2. Confirmation of this theory may be found in the fact that the matrimonial contract is a contract *that interests society, and on that account is regulated by authority*, whether religious, or civil as concerns the unbaptized. Regulation implies the means of control. It is neccessary, therefore, that the authority should be able to judge, when the occasion arises, of the existence of the matrimonial contract and of its validity. But, for that, it must be able to verify the existence of impediments, at least as a general rule ; and consequently, such impediments as are not based on obvious and tangible facts, must be removed from the list.

Let us apply this to the impediment of impotency. If engaged parties are required to possess *perfect and absolute* aptitude for generation, under pain of being incapable of marrying, there will be many cases in which defects, such as the absence of certain organs necessary for the reproduction of the species, will be neither obvious nor susceptible of proof by ordinary means (1) ; and in each of these cases, the authority, whose business it is to

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1. It does not matter if exceptionally and *per accidens* such or such a defect can be satisfactorily proved. The question is : are the defects of which we are speaking, of their nature obvious and tangible, and susceptible of proof by ordinary means ? If they are not, the exceptions may be regarded as of no importance.

do so, will be unable to decide with a thorough knowledge of the matter. This is why we say that it is aptitude or inaptitude, not for reproduction, but for normal conjugal relations, which ought to settle the question of the impediment of impotency. Such aptitude can be undeniably established.

3. A further argument, in corroboration of our view, may be drawn from the *grave inconveniences* inseparable from the opposite opinion. According to that, we must logically debar from marriage not only those women who have been deprived of the ovaries or have undergone the operation of oophorectomy, but also all those — and their name is legion — whose ovaries have become irremediably unproductive, as is generally the case after the menopause (cessation of the child-bearing period) ; it would also be necessary to debar all those men whose sperm has been accidentally vitiated or deprived of spermatozoids.

If we are told that *subjectively* and in concrete cases, i. e., in dealing with individuals, full and determinate certainty of inaptitude cannot be had, and that consequently marriage would not be forbidden : we reply that, even then, the cases would *objectively* fall under the ban, and that, under these circumstances, conjugal relations would constitute a material sin every time they took place. In our opinion this would certainly be a grave inconvenience.

All things being duly considered, we believe we may bring this passage to an end, by saying that the theory proposed by us rests on the weightiest reasons ; and we are justified in repeating that the impediment of impotency concerns only those cases in which *even partial aptitude is wanting*, and not those in which there is a possibility of normal relations, which, *as such, and taken in themselves, are fitted for generation*. It follows from this that marriage may be validly contracted by women who are without ovaries or matrix, or who have undergone the operation of oophorectomy, or again by those whose ovaries are definitively unproductive. In like manner, old men, whose sperm has been sterilized but not exhausted by age, who remain capable of true seminal emission, with the penis still erectable, are admitted to marriage.

B. This theory is **certain in practice.**

We maintain that, in practice, all persons who are *apt for the sexual act normally effected*, can marry, and enjoy conjugal rights *and certain in practice.*

with a perfectly safe conscience ; even though one of the parties is destitute of an organ or of an element that is necessary for fecundation, though not for conjugal relations. Thus marriage and the enjoyment of it are permissible notwithstanding oophorectomy and even the indubitably complete excision of the ovaries.

For, 1. when once *theoretical* or speculative *probability* of our doctrine has been established, it is evident that the practical application of it cannot be prohibited ; and this is the reason why :

Impotency, perpetual and anterior to marriage, constitutes a case that does not admit of dispensation, an *absolute and definitive* impediment. But, above, in n° 240, we have seen that this kind of impediment calls for some reservations in practice : there must be positive *certainty* of its existence before it can be employed for the prohibition of a marriage. Now, if our theory is probable, the impediment becomes doubtful for the cases in which it is applied. The conclusion is clear.

2. The Holy See, it seems, practically conforms to these views, since it permits the marriage of women who have undergone various amputations. This follows from many decisions of the Roman Curia, and in particular from a quite recent solution given by the S. C. de Sacram. (2 April 1909).

Among these various decisions, we may quote, in the first place, those of S. C. O. of 3 Feb. 1887, of 23 July 1890, *Quebecen.*, and of 31 July 1895, *Westmonasterien.*, (1), as well as that given by Wernz,

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1. This is the decision of 3 Feb. 1887. Question : « Can the woman N. N.., who has undergone the amputation of both ovaries and the uterus, be permitted to marry ? ». Answer : « Marriage must not be forbidden her ».— Decision of 1890. Question : « Can a person from whom the surgeon has removed both ovaries and the uterus validly contract marriage ? ». Answer : « Marriage must not be forbidden her ».—Decision of 1895. Question : « Can the young woman N.., from whom the surgeon has removed the ovaries, and who, though perfectly formed, cannot in consequence bear children, validly and lawfully contract marriage ? ». Answer : « The same answer must be given as in the *Causa Rhegin.* (1890), that is to say that, in the case given, marriage must not be forbidden her ».

The *Collectanea*[2], in n° 1733, gives the answer of 1890, and adds thereto in a note : « This answer concerns the particular case in question » ; likewise, in n° 1907, it gives the answer of 1895 and observes : « the same S. C. Inq. declared (16 Jan.1895) that in cases of this kind, recourse must be had (to Rome) each time, seeing that up to the present, only answers concerning particular cases have been given ».

o. c., nº 345, and dating from 1902 (1). But we do not insist too much on these answers, because it might be objected, not without some show of reason, that in the above mentioned cases,the Holy Office did not look at the question of principle ; but that there was a doubt about the facts set forth, namely a doubt as to the *total* removal (2). This doubt of fact, in the practical order, may have determined the decisions of the Roman Curia ; and consequently the scope of the answers is to that extent limited.

But the quite recent (1909) answer of the S. C. de Sacramentis is much more significant (3). It concerns a case in which the cir-

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1. According to Gasparri, o. c., nº 578 « there are yet *several* other analogous answers affecting projected marriages ; and in the case of marriage already contracted, the S.C.has logicaliy replied that the married persons must be left in peace. Whether it is a question of prospective marriage or of marriage already contracted, the S. C. has never decided against validity ».

2. As concerns the decision given in 1902, Wernz makes this observation, l. c. : « The S. C. de Inq. confronted with this new case of removal of the ovaries, before giving its answer, first asked the doctor who performed the operation, what was the exact amputation that had been made. On the surgeon replying that he could not attest with *full certainty* the *total* removal of the ovaries, the S. Congr. gave its decision : ' Marriage, in the case given, must not be forbidden '.

A propos of the decisions quoted above, Antonelli, *Pro conceptu impotentiae*, nº 78, affirms that the Secretary of the Holy Office declared to Father Bucceroni, that these answers supposed « that the excision of the ovaries and of the uterus was not total ». See, on this subject, the observations made by Father Ojetti, *Synopsis*, under *Impotentia*, nº 2422, as well as the conclusion that he draws from them in nº 2423 ; also Ferreres, *De Vasectomia*, n. 262 ss.

3.According to Ferreres, *De Vasectomia*, nr 234, and *Razon y Fe*,1910, I, p. 101 (translation in the *N. R. Th.*, p. 109), the text of the petition and answer is as follows :

Eminentissime Seigneur Cardinal-Préfet de la Congrégation de Sacramentis.

N.N., curé de St-Pierre de N., évêché de O., en Espagne, expose respectueusement à V. E. que, il y a quelques années, une de ses paroissiennes, nommée M. M., vivait en concubinage. Comme il s'informait pour la tirer de ce triste état, elle lui manifesta que dans une récente opération chirurgicale on lui avait enlevé la matrice et les ovaires. Le médecin qui lui avait fait l'opération, consulté, dit que l'ablation de la matrice et des deux ovaires était certaine. Puis-je en l'état procéder au mariage, ou dois-je considérer cette personne comme inhabile pour cause d'empêchement d'impuissance ? Et, vu l'ablation totale de la matrice et des deux ovaires, puis-je solliciter de Sa Sainteté dispense de

cumstances set forth,and the express attestation of the doctor who performed the operation,leave no room for doubt as to the *total and perfect removal of the ovaries* (1). Now, in this case the Congr. refers to the reply of the S. O., of 1890, in which it is decided that : « the marriage must not be prevented ». It refers thereto purely and simply, without making, or causing to be made, the least further inquiry into the facts set forth (2). And its decision was taken, not in a general meeting, but in a select committee composed of those members who meet, in accordance with the new regulations for the Reform of the Curia, for the purpose of solving questions « where the matter is clear, obvious and uncontroverted » (3). This fact seems to indicate that the same line of conduct will be followed henceforward in all similar cases. Moreover the S. C. C., 16 Dec. 1905, declared, that the question of the validity of marriage contracted with a woman deprived of the ovaries, is theoretically doubtful and, up to the present, unsolved by the Holy See ; hence it concludes that marriage to be contracted cannot be prevented, and that the parties, after having contracted it, must be left in peace (4).

Solution of difficulties. It is true that **objections** might be made in respect of the Roman decisions: a/ on the ground of contrary declarations of the S. C. C., notably in the

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l'empêchement d'impuissance (?) pour que l'intéressée vive chrétiennement ?

3 mars 1909, N. N.

La S. Congr. des Sacr., après mûre délibération, juge bon de vous répondre comme suit : « *S'il est averé que les faits exposés sont exacts, reportez-vous à la S. Congr. du S. Office, 23 juillet 1890, dans la Cause Quebec.*, c.-a.-d. *Le mariage ne doit pas être interdit* ». *Fait à Rome, le 2 avril 1909.* D. Jorio, sous-secr.

Arth. Mazzoni, Off.

1. See the text of the petition, and also the doctor's evidence, in Ferreres, o. c., n. 35 n° 253 ss.

The operation chosen in this instance was that of laparotomy, as is clear from the evidence of the doctor, given in the *N. R. Th.*, loc. cit., p. 201. And Antonelli, *Medicina Pastoralis*, 3rd ed. II, nos 546 and 548, says that, if there can be a question of an imperfectly complete removal of the ovaries when the operation is effected by way of the vagina or the sacrum, at all events, « the operation known as laparotomy, for removing the uterus or the uterus and the ovaries together, assures their total removal, and leaves no room for the slightest doubt on the subject ».

2. Ferreres, o. c., n° 259 s.

3. *Special rules* of the Reformed Curia, cap. II, n° 2.

4. Cf. *Pastor Bonus*, t. XXV, p. 377 s.

causa Salernitana, 2 Aug. 1862 ; *Verulana*, 24 Jan. and 22 June 1871 ; *Albiganen.*, 7 Sept. 1895 ; *Monasterien.*, 16 Dec. 1899.

But, in truth, in these different cases, the S. Congr. declared the marriage null on the ground of impotency ; but it appears that this was not due to the absence of the uterus and ovaries, but rather to the absence of the vagina, or, again, to a conformation of the vagina visibly and essentially defective, as is particularly evident in the *Causa Monasterien.* See FERRERES, o. c., n° 268 ss.; the *Anal. Eccl.*, 1900, p. 241 s. ; *R. th. Fr.*, 1900, p. 295 s., p. 349 s., p. 400 s. ; *N. R. Th.*, 1910, p. 197 s. ; the *Can. Cont.*, 1903, p. 611.

b/ An objection might also be drawn from the action of the Dataria Apostolica in a question of dispensation. For ANTONELLI, *Medicina Pastor.*, II, p. 547, gives a case in which the Dataria refused to grant a dispensation from consanguinity (it was a case of relationship in the first and second degree mixed), because it was stated that both ovaries of the petitioner had been removed ; but a little later, on learning that one ovary only had been removed, it changed its opinion, and granted the petition.

To this we reply : in the first place, this decision cannot prevail against the line of conduct followed by the Holy Office and the S. Congregation of the Sacraments. In the second place, in the case proposed, it was not directly a question of the impediment of impotency. Finally, in the eyes of the Dataria, the absence of the ovaries might very well be a reason for refusing a dispensation from consanguinity to relations so closely related, without their considering the removal of the ovaries as an impediment incapable of dispensation.

c/ ANTONELLI, l.c., draws an argument from the text of the *Praxis apostolicarum dispensationum super impedimentis matrimonialibus secundum reformatas formulas apost. Datariae* (Rome, 1902). He quotes a passage in which it is stated that the impediment of affinity is not contracted by sexual relations had with a woman who has undergone the amputation of the uterus and ovaries (1).

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1. « As to affinity, it must be specially noted that it is contracted only as a result of sexual intercourse that is, of its nature, sufficient for fecundation. It involves, therefore, the union and mixing of both seminal secretions, the male and the female. But when there has been, on the part of the man, emissio spermatis, there is presumed in law the corresponding secretio foeminae, together with the mingling of the two substances. This is why it is always necessary under those circumstances to ask for a dispensation from the impediment of affinity, unless the presumption has to yield to the establishment of the contrary ; e. g., if the uterus and the ovaries are entirely wanting in the woman. For in that case the secretio foeminea, i. e., the ovulum, that is the element physiologically

But the argument is not conclusive. As BOUDINHON remarks, *Can. contemp.*, 1903, p. 612, in the first place we have not here a strictly official text. Then, and especially : « It is impossible not to be struck with the confusion of the terms employed. It is certain that the ancient canonists, when they said that the mixing of the semina was necessary for sexual intercourse, did not mean by that, on the woman's side, the ovulum that is physiologically indispensable for fecundation, but rather the secretion of the vulvo-vaginal glands that accompanies coition. But it is just this latter sense which the first part of the text appears to give to the word *semen*, while the second part understands by it the ovulum. But the ovulum is wanting not only in women who have undergone amputation of the ovaries, but also in women of an advanced age ;... and who will maintain that sexual relations with these latter do not produce affinity ? »

Note. **Note. 1.** One cannot infer from the decisions of the C. S. O. and of the S. C. de Sacr., given above (B, 2.), the speculative *certainty* of our theory concerning the impediment of impotency ; for the line of conduct adopted by the SS. CC. does not imply anything more than the *probability* of the doctrine, as we have already made sufficiently clear.

2. We have omitted to appeal, in support of our view, to the quasi-unanimous opinion of ancient authors. Almost all of them deny that the impediment of impotency can arise from the absence of the ovaries. But their opinion is of little account in the matter, considering their ignorance of physiological laws, and especially of the part played by the ovulum (1).

Of modern authors, most take our view ; while others favour the contrary opinion (2).

3. We logically class as *sterile*, those capable of normal relations, but unfitted for generation, in consequence of some defect or malformation of an organ necessary for fecundation, but not for the sexual act properly so called. Those who hold the contrary opinion, in accordance with their system,

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requisite on the part of the woman, is wanting, and the intercourse is no longer of its nature sufficient to lead to fecundation ».

1. See the *Collat. Brug.*, t. VII, p. 480.

2. Notably ANTONELLI, in his *Theologia Pastoralis*, already quoted, and in various pamphlets : *De Conceptu Impotentiae ; Pro conceptu Impotentiae* ; *De mulieris excisae impotentia*. Also, DE LUCA, o. c., n° 566, and in the *Votum* on the *Causa Monasterien.* (cf.R. th. fr., 1900, p. 302 s.) ; LEITNER, *Lehrb.*, p.153 s.; ROSSET, o. c., II, n. 1410 ; SCHNITZER, o. c., p. 355 ; WERNZ, o. c., IV, n° 345, note 34 ; TOPAI, o. c. ; BUCCERONI, *Theol. Mor.*, II, 994 ; *Anal. Eccl.*, 1903, p. 230 s. ; CASACCA, in the *Eccl. Rev.*, 1902, p. 609 s. ; *Pastor Bonus*, 1904, p. 191 s. ; ALBERTI, *Theol. Pastor.*, Rome, 1904, IV, n° 88 ; CAPELLO, in *Scuola Cattolica*, XXII (1912), p. 247. LEHMKUHL, *Theol. Mor.*, II, n° 744, and in the *Eccl. Rev.*, p. 314 s. inclines to the same opinion.

look upon such as impotent. In our view, then, those women are sterile, who have undergone the removal of the ovaries, and of the matrix, or the operation of bilateral oophorectomy, as well as those who have passed the age of bearing. Sterile also are men whose sperm has been rendered infecund by age, but who still remain capable of the erection of the penis together with emission.

4. The natural law makes no distinction between the different causes that may induce this sterility. Therefore, whether it is a case of a congenital defect, or of a lawful surgical operation, or even of an unlawful operation performed for the purpose of bringing about infecundity, the persons in question are capable of marrying. Nevertheless, the Church would be right, if it so wished, to prevent from marrying, by placing them under an ecclesiastical impediment, such women as have recourse to a fraudulent operation, like that of ovariotomy or of oophorectomy, with the object of preventing any possible fecundation (1).

III. Duties of parish priests and confessors.

279. *Duties of parish priests and confessors.*

1. Ubi *suspicio* habetur de impotentia, maxima prudentia est opus, praesertim si suspicio post matrimonium oriatur : prudenter remittatur pars suspecta ad probum medicum, quem consultatum adeat, *quin disturbetur bona fides* vel dubium ingeratur de nullitate matrimonii praesertim jam contracti.

2. Si praesto est impotentia dumtaxat *consequens* vel *temporanea*, matrimonium manet validum, sed illicitus est ejusdem usus, quousque perseverat certa impotentia, licet non raro conjuges quoad hunc usum *in bona fide sint relinquendi* (2) : aliàs instituenda est separatio tori, juxta principia posita n. 259, vel exceptionaliter etiam cohabitationis, si aliter vitari nequit incontinentiae periculum. Cf. n. 153.

3. Si ex summario illo medici examine *omninò constat* de *antecedentis ac perpetuae* impotentia existentia, excluso quovis dubio juris vel facti, certò deficiente scil. organo ad ipsam copulam

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1. Bureau, o. c., p. 35, gives the statement of Dr Cann, to the effect that, « in Paris, during the last fifteen years, the operation of ovariotomy has been performed on 30,000 or 40,000 women, and that there are in France 150,000 women without ovaries ».

2. Cf. *Collat. Brug.*, t. VII, p. 478 s., coll. Ojetti, *Synopsis*, V° *Impotentia* n. 2428. Ita in specie, pro hypothesi quod vasectomia non inducat nisi temporaneam impotentiam, non esset legitimus matrimonii usus ex parte vasectomiaci, donec ejus impotentia fuerit curata, idque sive vasectomiam subierit post matrimonium sive ante illud.

necessario, matrimonium futurum est impediendum, et in matrimonio sic nulliter contracto usus conjugii est per se [1] interdicendus, ac procuranda est *authentica nullitatis declaratio,* nisi, quod rarò praestat, consulenda videatur habitatio fraterna, juxta dicenda sub n. 407.

Nimirum parochi non est nec confessarii nullitatem privatim declarare, sed hoc spectat ad forum publicum Ecclesiae, quae authentice nullitatem declaret praeviè instituto processu ad tramites juris [2], et sententia lata duplici ac conformi eaque per interpellationem non suspensa.

Quodsi nullum declaretur matrimonium ob impotentiam *absolutam,* simpliciter prohibentur novae nuptiae parti impotenti [3]; si sententia nititur in impotentia *relativa,* solet parti impotenti indici transitus ad alia vota *inconsulta S. Sede,* vel cum restrictione ut non ducat nisi viduam [4].

4. Si *dubium* manet jure vel facto, dubium submittatur *Ordinario,* casu ex integro exposito, et ab eo norma agendi postuletur [5]. Haec autem generatim *norma* erit ab Ordinario sequenda, ut *ante* matrimonium nuptiae *dissuadeantur,* vel *differantur,* si dubium

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1. Etiam nonnunquam opportune relinquuntur pseudo-conjuges in bona fide, si graviora ex monitione timentur mala ; saltem in bona fide serventur donec solutio Episcopi intervenerit.

2. Procedura in causis matrimonialibus sequenda describitur infrà, ubi de *Processu matrimoniali.* Sufficit hîc notasse speciales normas esse adhibendas ad hoc ut constet de impotentia antecedente et perpetua, potissimum in deputandis ex officio medicis peritis et obstetricibus ad faciendam inspectionem corporalem partis impotentis, quas similes normas applicandas diximus in causis non consummationis, n. 186, col. II. cc.

3. Profectò altera pars potest liberè novum inire matrimonium, ea tamen lege ut, si postea detegatur compartem reipsa non fuisse impotentem, ad hanc redeat, relicta nova comparte, nisi primum matrimonium, utpote non consummatum, dissolvi curetur novumque conjugium convalidetur. Cf. *Quartalschr.* (Lintz), 1906, p. 211 ; KUTSCHKER, o. c., III, p. 103 ss. ; SCHNITZER, o. c., p. 365 s., coll. p. 362.

4. Cf. suprà, n. 186.

5. Hujusmodi dubio juris est locus, juxta suprà dicta, quotiescumque occurrit defectus organi ad foecundationem requisiti aliunde quam ex parte ipsius actus, in specie ubi facto constat de omnimoda absentia utriusque ovarii. Nimirum, licet practice tuta videatur sententia, mulierem ovariis orbatam potentem declarans, manet tamen speculative dubia, et praestat in casu consilium exquirere Ordinarii.

afficit impotentiae perpetuitatem (1), *non* tamen *interdicantur*, saltem ubi res est de dubia impotentia absoluta, utque *post* matrimonium regulariter *servetur silentium circa dubium* conjugii valorem, ac usus matrimonii permittatur, in quantum exerceri potest, quousque dubium perseverat (2). Quodsi adjuncta dissolutionem matrimonii suadeant, dubium ad *S. Sedem* referatur solvendum ; aut, ubi de dubio facti agitur, processus instituatur juridicus sive coram Tribunali Episcopi, sive directè coram Tribunali Romano. Dubio facti perseverante, solet nunc, relicta praxi olim in usu triennalis experimenti (3) ac congressus (4), examen peragi circa matrimonii *non consummationem* (5), de qua si constat, sollicitatur a R. Pont. dispensatio super matrimonio rato non consummato (6). Haec autem dispensatio ob dubiam impotentiam haud aegre conceditur, saltem ad cautelam (7), vetito etiam pro parte suspecta transitu ad novas nuptias, inconsulta S. Sede (8).

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1. Id applica *vasectomiaco*, in quantum de ejus impotentia perpetuitate est dubitandum : differatur scil. matrimonium donec operatione restituta fuerit coeundi potentia, cum enim, stante illa impotentia, periculosissimum foret eum admittere ad nuptias.

2. Cf. suprà n. 142.

3. Circa *triennale experimentum*, ejusque originem Romanam (a Justiniano prius statutum fuerat spatium biennii, postea triennii spatium), vide ESMEIN, o. c., I, p. 252 s., ubi notatur illud fuisse usurpatum potissimum in casu quo suspicio erat de maleficio. Nota etiam primitus quoque in usu fuisse *judicium Dei*, per crucem, vel per aquam et ferrum. Cf. *Conférences de Paris*, III, p. 156 ss. ; SCHNITZER, o. c., p. 349-351 ; GIBERT, *Tradition ou Histoire...*, I, *Histoire de l'empêchement d'impuissance*, p. 2 ss.

4. De pudenda praxi *congressuum* (congressus = concubitus), cf. ESMEIN, l. c., p. 275 ss. ; coll. BROUARDEL, o. c., p. 95 ss. Non videtur illa praxis viguisse extra Galliam in qua floruit inde a medio saeculo 16° usque ad annum 1677.

5. Haec via in dies saepius adhibetur, utpote securior, statim ac habetur umbra dubii circa impotentiam nuptias irritantem (cf. varias causas relatas apud KUTSCHKER, o. c., III, p. 111-155) ; et sic providè vitatur hypothesis qua matrimonium, ex errore nullum declaratum ob apparentem impotentiam, postea reperiatur validum. Cf. etiam n. 276, in nota, sub fine. Non desunt tamen causae in quibus, etiam nunc temporis, nullum declaratur matrimonium ex capite impotentiae, uti contigit in Causa *Premislien.*, 14 Maii 1898, apud *A. S. S.*, XXXI, p. 196 ss. ; in Causa *Monasterien.*, apud *R.th. fr.* 1900, p. 295 ss. ; in Causa *Albigan.*, apud *Canon. contemp.*, 1896, p. 233 ss. ; in Causa *Versalien.*, 22 Aug. 1908, apud *Anal. Eccl.* 1908, p. 376 ss., necnon in causa citata et ex integro exposita, cum omnibus actis judicii, apud PIERANTONELLI, o. c., II, p. ss.

7. Cf. Causam *Cameracen.*, apud *Anal.* Eccl., 1899, p. 239 ss.

8. Cf. Causam *Versalien.*, l. c.

Scholion I. Hermaphrodites.

280. Cases of hermaphrodism,

Hermaphrodites are those who partake of both sexes at once. There are :

1. *Apparent* hermaphrodites, i. e., persons who are of a well defined sex, but in whom certain external genital organs present more or less the formation of those of the other sex (1).

2. *True* hermaphrodites, really possessing, entirely or in part, the genital organs of both sexes. BROUARDEL, a foremost authority on the subject, observes that no complete hermaphrodism exists : « No example has yet been found of a being that presents, both externally and internally, the attributes of both sexes ; in all the cases observed, the faults of formation in the genital apparatus were incomplete, with a predominance, more or less decided, of the male or female ». Loc. cit., p. 19.

There are, then, only incomplete hermaphrodites, in whom one of the two sexes always predominates. Sometimes the attributes of the one will be complete and those of the other defective ; sometimes they are not sufficient for either sex (2).

What has been said is sufficient for the ready solution of the question of principle from the point of the impediment of impotency. Difficulty can only arise in establishing the existence of the fact. We accordingly hold :

a/ Where the existence of genital organs of one sex, sufficient for normal relations, can be established with *certainty*, there is no obstacle to marriage notwithstanding the partial co-existence of organs of the other sex.

b/ Where such relations are *certainly* impossible, owing to the insufficiency of the organs, there can be no question of marriage. This is the most common case.

c/ In doubt, and after examination, marriage must be discountenanced, though, it seems, it cannot be absolutely forbidden, as long as aptitude for relations remains really probable. Needless to say, the prospective partner must be enlightened as to the state of affairs.

Scholion II. Artificial fecundation.

and of artifi-

Foecundatio artificialis, sensu *strictiori*, venit pro foecundatione mulie-

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1. Pseudo-hermaphrodism is of the masculine or feminine type. The former « consiste essentiellement en un hypospadias avec fissure scrotale, simulant une vulve et un vagin plus ou moins développé ». The latter « est constitué par un excès de développement des organes ; on trouve un clitoris qui peut avoir jusqu'à 7 et 8 centimètres de longueur ; les grandes lèvres soudées peuvent être prises pour le scrotum ». BROUARDEL, o. c., p. 20 and 21.

2. « Un cas fréquent est celui où on trouve deux testicules et un ovaire ;... le plus souvent on trouve un ovaire d'un côté et un testicule d'un autre ». L. c., p. 19. The rest of the genital apparatus, in the cases examined, presented the attributes of one sex only.

ris artificialiter procurata *extra copulam* ritè peractam, suscepto scil. semine virili in pollutione solitaria vel in copula onanistica cum retractu, illoque ope siphunculi in vas muliebre introducto. *cial fecundation.*

Latiori sensu etiam dicitur foecundatio artificialis, quando, rite paracta copula et semine in vagina (licet fortè ad ejusdem introitum) deposito, arte procuratur penitior dicti seminis introductio in interiora mulieris, putà si semen per copulam in vagina emissum illico recolligitur et ope siphunculi interius trajicitur.

Stricte dicta foecundatio artificialis, eaque, ut opinamur, sola [1], est reprobanda utpote intrinsecè vitiata in pollutione solitaria vel onanistica ; illam spectat responsum C. S. O. 24 Martii 1897, illicitam proclamans artificialem foecundationem [2]. Cf. Eschbach, *Disputationes* p. 70 ss. ; Antonelli, *Medicina Pastor.*, n. 437 ss. ; *N. R. th.*, t. XXIX, p. 323 ss. ; Ballerini-Palmieri, o. c., VI, n. 1304 ; Van De Burgt-Schaepman, o. c., I, n. 208a.

Scholion III. Juridical evolution of the impediment of impotency.

281. Ancient discipline.

The idea of impotency and its incompatibility with marriage were not in the beginning determined with exactness, but were developed little by little.

The earliest ecclesiastical documents make no mention of impotency. It is apparently met with for the first time in the *Penitential of Theodore* [3] dating from the seventh century. This work permits the wife of an impotent husband to contract a fresh marriage. In the sequel, many Doctors, especially among the partisans of the Copulatheoria, considered impotency, not as a diriment impediment, but rather as a cause for the *dissolution* of an unconsummated marriage. See, among others, the testimony of Hinc-

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1. Foecundatio artificialis late dicta non censetur illicita vel a S. Sede reprobata, saltem si semen a viro coeunte in vagina depositum ita recolligitur ut, antequam in uterum trajicitur, praevie non extrahatur ex vagina mulieris.

2. Ad dubium : « An adhiberi possit artificialis mulieris foecundatio ? », Em. Cardinales Inquisitores, omnibus diligentissimo examine perpensis, praehabitoque Consultorum voto, respondendum mandarunt : « *Non licere* » ; quam resolutionem SS. approbavit et confirmavit.

3. Wasserschleben, o. c., l. II, tit. XII, 32 (p. 216) ; Schmitz, o. c., ad h. l. (p. 547) ; Sehling, *Die Wirkungen*, p. 17 ; Sägmüller, *Theol. Quartalschr.*, 1905, p. 83 s. ; 1911, p. 92 ss. ; in the latter passage he occupies himself especially with impotency in women, and shows that it was known in canon law from the eighth century. On the other hand, Koch, o.c., p. 5-13, and *Deutsche Zeitschrift f. Kirchenr.*, XXII (1912), p. 227-256, maintains that the impediment of impotency was unknown before the twelfth century, and that it is first mentioned in the decree of Alexander III (4, X, IV, 15) ; Gillmann opposes this in the *Archiv f. k. Kirchenr.*, 1909, p. 772 ss. and 1910, p. 244.

mar, cap. 4, C. XXXIII, quest. 1 (1); and the dictum of Gratian on this subject. They permit a woman, whose husband is impotent, not only to contract a fresh union, but even to continue therein, where the impotency of the first husband is afterwards found to be counterfeit. On the contrary, Peter Lombard, an opponent of the Copulatheoria, admits the *diriment impediment of impotency*, but only where the healthy party is ignorant of the partner's condition (2).

The Roman Church seems always to have held impotency as a diriment impediment (3). But in former times, it refused to separate married people on that account, and required them to continue to live together, but as brother and sister. Nevertheless, it never claimed to extend this disciplinary regulation to other countries, where a more indulgent discipline prevailed (4). Later, from the time of Alexander III, it relaxed its severity in this respect, and the discipline at present existing came into force (5).

Scholion IV. Civil legislation.

Civil legislation.

Our (the Belgian) *civil law* (6) does not consider impotency as a diriment impediment (7), and consequently refuses to admit it as a cause for the annulment of marriage, even when the parties where ignorant of its exist-

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1. See SEHLING, *Die Wirkungen*, p. 25, where the author is at fault in his interpretation of Hincmar.

2. Peter Lombard (l. Sent. IV, Dist. XXXIV) considered the condition of those afflicted with frigidity or impotency as holding a *middle place* between aptitude and inaptitude for marriage.

3. Chapters 1 and 2 of C. XXXIII, qu. 1, speak plainly in this sense. They say that marriage, dissolved on account of impotency, must be re-established when it is apparent that the impotency in fact does not exist.

4. Chapters 2 and 4, *Comp.* I, IV, 16, bear witness to this rigorousness of discipline within the Roman Church ; as also the introduction to chapter 2, X, IV, 15 and to chapter 4, X, IV, 15. See also the *Conférences de Paris*, III, p. 103-106 ; SÄGMÜLLER, *Theol. Quartalschr.*, 1905, p. 88 s. ; and the Rescript of Gregory II to Boniface (726), of which we have spoken above, in n° 200.

5. Chapters 2 and 3, X, IV, 15.

6. The Austrian civil law, on the contrary, admits this impediment, except in cases in which an operation without danger could remedy it, although, perhaps, the party concerned is unwilling to undergo it. Cf. SCHNITZER, o. c., p. 364. In the German law, the impediment of impotency is not, indeed, explicitly recognised, but proceedings can be taken for the annulling of a marriage with one who is impotent, in virtue of art. 1333, on the ground of error as to the condition of the partner.

7. Among the causes that induced the State to eliminate impotency from the list of civil impediments, must be reckoned the scandals formerly provoked by the shameful practice of « congressus », Cf. PLANIOL, o. c., n° 712 s.

ence at the time of the marriage(1). It simply requires that the parties should be of different sexes. Thus, in cases where appearances have proved deceitful, and where it is a matter of a man masquerading as a woman, or vice versa, the marriage contracted is regarded as null and non-existent (2).

Should a case occur, in which the Church pronounces a marriage null on the ground of impotency, while the State refuses its acquiescence, one might then consider the possibilty of a civil divorce as a way out of the difficulty.

Article 3. The Impediment of a previous and existing marriage (Ligamen).

Law in force.

The diriment impediment of ligamen *consists in the inability of a person to contract a fresh marriage, while the bond of a previous valid marriage still endures. This impediment ceases when the previous union is dissolved, or when it is found that it was invalidly contracted ; it is, however, lawful to marry again only after an authoritative declaration of dissolution or of nullity.*

Explanation.

282. *The bond constitutes a diriment impediment even in the natural law.*

1. This inability is founded *on the law of monogamy*. As we have said above in n^os^ 173 ss., this law has its origin in the natural law and in the positive divine law, in this sense, that polyandria is opposed to the primary principles, and polygyny to the secondary principles of the natural law.

We say : *while the bond of a previous valid marriage endures.*

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1. Thus the French Court of Cassation, 6 Apr. 1903, quashed the sentence of the Court of Appeal of Douai, declaring null the marriage contracted by a man with a woman who had the external appearances of the feminine sex (breasts, formation of pelvis, clitoris),but was without the internal organs (vagina, ovaries, matrix),the absence of which constituted a case of certain impotency.The Supreme Court justified its sentence of cassation on the ground that the Code Napoléon required only diversity of sex, which existed in this instance. *Pasicrisie*, 1902, IV, p. 54 and 1903, IV, p. 148. See also in Brouardel, o. c., p., 359 s., a decision of the civil Tribunal of Alais (1869), a sentence of the Court of Appeal of Nîmes (1869), of the Court of Cassation (1872) and of the Court of Montpellier (1872). We must, however, quote in a somewhat contrary sense the dicision of the Tribunal of Orléans, of 11 Apr. 1894 (Brouardel, p. 358), and the decision of the Tribunal of Béthune, of 13 Jan. 1898, given in the *Anal. Eccl.*, 1899, p. 340.

2. Cf, ll. cc.

Whence it follows that, if the previous marriage was invalidly contracted, or has been dissolved by the death of one of the partners, or by the authority of the Sovereign Pontiff, or by solemn profession, or by the Pauline privilege (1), there is no diriment impediment. On the other hand, the impediment of the bond endures *so long as the valid marriage exists,* even though it be *unconsummated,* that is to say,so long as it is not certain that it has been either invalidly contracted, or dissolved for any reason whatever.

This is why, if, after a second marriage contracted in good or bad faith, it is found that the former partner is still living, the pseudo-married couple must separate, and conjugal life be resumed with the former partner, unless there be some sufficient reason for living apart.

2. In order that one may *lawfully* marry again, *private* certainty of the *nullity* of the previous marriage does not suffice ; but, as it is a matter that concerns the external forum, there must be an authoritative declaration, i. e., made either by the Holy See or by the Ordinary, in accordance with what we shall say below in n° 339, when speaking of Matrimonial Procedure. In like manner, for the *dissolution* of a marriage, there must be an authoritative declaration, at least in case of doubt, as for instance, when the decease of the former partner is not proved ; there must then also be a juridical inquiry, of which we shall speak below, in n° 330, when dealing with the *Duties of the Parish Priest with regard to prospective spouses.*

283. *Penalties.* *Note. Polygamists* must be treated as public sinners, and they are moreover liable to various penalties, namely : irregularity, legal infamy, excommunication *ferendae* and even *latae sententiae* in case of heresy (Council of Trent, Sess. XXIV, can. 2). Other penalties also may be incurred, which for the most part are not applied at the present day. See the *Collat. Brug.*, t. III, p. 240 s. ; Wernz, o. c., n° 363 ; and above, n° 214 ; see also below, n° 330, 5., in note.

Civil law. **Scholion.** *Civil legislation.* Art. 147 of the *Code Napoléon* says : « On ne peut contracter un second mariage avant la dissolution du premier ».

1. In the Case of the Apostle, as we have said above, n. 193, re-marriage is permitted to the baptized party *before* the previous marriage has been *really dissolved,* that is to say, the refusal of cohabitation coming from the unbaptized party renders it *dissoluble.*

See also above, in n° 243, the *prohibition* forbidding a widow to marry again before ten months have elapsed since the death of her husband (1).

In the Belgian *Code Pénal*, art. 391, the following penalty is provided against *bigamists* : « Quiconque étant engagé dans les liens du mariage en aura contracté un autre avant la dissolution du précédent, sera puni de la réclusion ».

Article 4. The impediment of Vow and of Orders.

Law in force.

284. *Are diriment impediments of the ecclesiastical law:*

I. *The solemn* **vow of chastity**, *as well as the simple vow taken by the Scholastics of the Society of Jesus, constitutes a diriment impediment in ecclesiastical law.*

Explanation and Proofs.

the solemn vow of chastity,

1. We say : the *solemn* vow of chastity ; that is to say, the vow of chastity (accompanied by the vows of poverty and of obedience), taken during solemn profession in a religious order strictly so called (2). This solemn profession is ordinarily made three years after the novitiate, which itself lasts for one year (3).

Boniface VIII, *in c. unic.*, III, 15, in VI°, clearly teaches the diriment force of this vow : « Considering, therefore, that the solemnity of the vows is only of ecclesiastical institution...we think it right to declare by these presents, that that vow alone is to be considered as solemn, and diriment of marriage contracted (or to be contracted) hereafter, which is taken solemnly (in the recep-

1. As we have observed in n° 243, this latter prohibition does not exist in canon law ; but it is nevertheless right to observe it, and it is repugnant even to the natural law that a widow should marry again too quickly,and so expose the child which she may have already conceived, to the risk of being attributed to the second husband. See also the *Conférences de Paris*, III, p. 92 s.

2. On the *difference* between the *solemn* vow and the simple vow, see the authors mentioned above, in n° 189. It should be remembered that, according to the most common opinion, religious women of France and Belgium have not solemn vows, even when they belong to an Order that has solemn vows. According to Leitner, *Lehrb.*, p. 175, the same holds good, with few exceptions, for North America and Bavaria.

3. This rule was established by Pius IX in his Encyclical Letter of 19 March 1857, and Leo XIII extended it to the Orders of women, 3 May 1902. A. S. S., XXXV, p. 31.

tion of sacred Orders, or) in the profession whether express or tacit, made in one of the religious orders approved by the Holy See » (1).

The Council of Trent, Sess. XXIV, can. 9, hurls anathema against any who should maintain that « clerics raised to sacred Orders, or regulars who have made *solemn profession of chastity*, can contract marriage, and that such marriage is valid, notwithstanding the law of the Church or their vow ».

as well as the simple vow of the scholastics of the Society of Jesus,

2. In virtue of the privilege, still in force, granted by Gregory IX, in the Constitution *Ascendente Domino*, of 25 May 1584 (2), (a privilege which cannot, however, be extended to other Orders in virtue of ordinary communication) (3), the *scholastics of the Society of Jesus* take, after two years' novitiate, ***simple*** vows which invalidate marriage, until the said scholastics have lawfully left the Society.

3. The Impediment of Vow and of Orders is *of the ecclesiastical law*. If, in fact, the solemn vow invalidated marriage by its very nature or by the divine law, it would be necessary to attribute the same effect to a simple vow of chastity (4), since before the natural and divine law, simple and solemn vows are of equal weight; the distinction between them is one of purely ecclesiastical law, as is recognised by all, and as is taught by Boniface VIII, l. c.

In confirmation of this we may add that, in the powers granted in 1888, in favour of the dying, solemn profession is expressly said to be among the impediments of ecclesiastical law.

but not the vow taken in the world by the wife of one promoted to Orders.

Note. The most probable opinion holds that the *vow taken in the world by a wife, whose husband has been promoted to Orders,* does not invalidate marriage, although many authors say that it does, follow-

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1. At the time of Boniface VIII (1294-1303), all the religious congregations approved by the Holy See were Orders strictly so called, and it was not till later that Congregations with simple vows came into being. This is why Pope Boniface speaks without restriction of approved religious orders. See SCHARNAGL, o. c., p. 200 ss.

2. The reason of this privilege seems to be that, in the Society of Jesus, many religious never make their solemn profession, and those who do, only do so long after having taken their simple vows. Cf. LEITNER², *Lehrb.*, p. 177.

3. Cf. WERNZ, o. c., nº 379, note 47.

4. We do not speak of the *prohibition* of marriage, which is consequent on the vow in virtue of the divine and natural law.

ing SANCHEZ, o. c., l. VII, D. 40, nos 1 ss., and BENEDICT XIV, *De Syn. dioec.*, l. XIII, ch. 12, no 16 (1). It would appear that the earlier law, which gave this vow a diriment power, was abrogated by the Decretal of Boniface VIII, nor does it seem to have been anywhere subsequently renewed by any canonical provision (2).

285. *In the Latin Church, Orders received under the requisite conditions*

II. *In the Latin Church, Major* **Orders** *validly received, without grave fear unjustly imparted, and with knowledge of the obligation to continency, constitute a diriment impediment to marriage, by the ecclesiastical law, in virtue of the constitution of the Church which directly attaches to Orders the law of continency with a diriment clause.*

Explanation and Proofs.

1. For the certain existence of the impediment, *three conditions* are required. a/ The first is the valid reception of one of the major Orders. b/ The second consists in the *absence of fear* unjustly imparted.In the case in which such fear would not render the ordination invalid, it is very probable, by a kind of canonical equity, if we may use the expression, that he who has been thus promoted, would not be bound to the grave obligation of continency, until he had ratified his ordination (3) ; but, if, in the case supposed, there is no obligation to celibacy, there is no diriment impediment, since this supposes that obligation. c/ The third condition is *knowledge, at least confused,* of the obligation attached to the reception of Orders. Ignorance on this point,in no way detracts from the validity of the ordination, but it makes this obligation not binding on the person ordained, at least in a way that is certain,and consequently renders future marriage not certainly invalid (4).

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1. The same must *a fortiori* be said of a private vow taken by one of the parties, when the other makes solemn profession.

2. Cf. above, no 158 ; SCHARNAGL, o. c., p. 194 s. ; WERNZ, o. c., IV, no 395, note 63 ; SCHERER, o. c., II, p. 368 s. Consequently, on the death of the husband, the widow, in these circumstances, could *validly* marry again.

3. See KUTSCHKER, o. c., III, p. 265 ss. ; FEVE, *De Imp.*, no 507 ; GASPARRI, o. c., no 587 ; WERNZ, o. c., IV, no 394, note 54 ; DE BECKER, *De Matr.*, p. 156. See also the *Causa* decided 7 Dec. 1861, in the *Acta S. Sedis*, p. 228 ss., together with the explanatory notes.

4. This is why *infants* and *those under the age of puberty* (as formerly happened) received Orders validly, but were not, except by subsequent acceptance (after the age of sixteen), bound to observe continency, and were capable of contracting marriage. See BENEDICT XIV, Instr. of 4 May 1745, *Eo quamvis*, par. 20 ss.

constitute a diriment impediment,

2. *Orders* received under the requisite conditions undoubtedly constitute a *diriment impediment* of marriage. This is certain, and is clearly taught in can. 7 of the second Council of Lateran, held in 1139 (ch. 40, C. XXVII, qu. 1) (1), and in canon 9 of the Council of Trent, already quoted. It is evident that by Orders are here understood the major Orders, namely the priesthood, the diaconate and the subdiaconate.

Authors, however, are not in agreement as to the *origin* of this impediment. Some refer it to the divine law, others to the ecclesiastical law ; some derive it directly from the ordination itself, others from the vow taken in ordination.

the invalidating force of which comes immediately from ecclesiastical institution.

However it may be with regard to this latter point, we must agree that, *in the last analysis, the impediment comes from the ecclesiastical law.* It is not the *ordination* itself that renders marriage invalid or illicit, since in the Greek Church the one does, in fact, exist simultaneously with the other; besides, what the Greek Church still has at the present time, marriage and its use coincident with the priesthood, the universal Church had during the first three centuries. Neither is it the *vow* (in so far as it exists here), that has of itself a diriment power, as we have seen ; and if

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(*P. Bull.*, III, p. 128 ss.) ; Gasparri, o. c., nº 586. As to those *of the age of puberty, complete ignorance* of this obligation could hardly be admitted in the external forum, but it would render the obligation of perpetual continency at least doubtful, and consequently the impediment to marriage doubtful also. See Scharnagl, o. c., p. 214 ; Wernz, o. c., IV, nº 394, note 53 ; Van de Burgt-Schaepman, o. c., nº 130 ; Laurentius, o. c., nº 630 ; Gasparri, o. c., nº 588, who maintains the contrary opinion.

One cannot here allege against our opinion the doctrine set forth above in nº 238, namely, that ignorance of the law invalidating a marriage does not deprive it of its effect. For the ignorance in the present instance, is not ignorance of the invalidating law itself, but of the obligation to celibacy, on which the diriment impediment rests, and which it presupposes.

1.« In order that continence and purity so pleasing to God may spread among ecclesiastics and those promoted to sacred Orders, we ordain that bishops, priests, deacons, subdeacons, canons regular, monks and professed lay brothers who, transgressing their holy purpose *(propositum)*, have presumed to take to themselves wives, be separated from them. For such union, clearly contracted against the law of the Church, we hold not to be marriage... We decree that the same be observed with regard to nuns who, which God forbid, may have attempted to marry ».

it entails a prohibition of marriage, it is still the ecclesiastical law that causes it to be taken in the course of ordination.

The controversy is, therefore, reduced to this. Has the Church *directly* established this impediment by attaching it immediately to ordination, in other words, by incapacitating clerics promoted to to major Orders, as it incapacitates impuberals, with regard to marriage ; or has it only caused the vow of chastity to be imposed, and by means of this solemnized vow, caused a prohibiting and diriment power to be *indirectly* attached to Orders ?

The former opinion seems to us preferable. The absence of a *general* law imposing the taking of this vow militates in its favour (1), no less than the fact that those who, in a valid ordination, exclude the vow, nevertheless remain bound to the observance of continency (2).

In vain those who hold the contrary opinion, put forth as an irrefutable argument the decretal of Boniface VIII, quoted above. That decretal does not in the least enjoin the tacit emission of the vow of chastity in ordination ; but in order to determine what vows are reputed to be solemn and to invalidate marriage, it declares that the simple and private vow of chastity, *in the case in which it has been taken before ordination or in ordination itself* (which

1. There were many prescriptions of the *particular* law in this sense. See, e. g., the *Synodus Vintoniensis* (HARDOUIN, o. c., VI, col. 1559), held in 1076, where may be found the form of vow to be taken in the ordination of a subdeacon : « N... promitto Deo, omnibus sanctis Ejus castitatem corporis mei, secundum ordinem mihi imponendum, servare, Domino Praesule N... praesente ». See in SCHARNAGL, o. c., 208 s., the solution of a difficulty drawn from ch. 6, X, III, 3, in which Innocent III seems at first sight to impose the taking of the vow as a general law.

2. The text of the Council of Trent also rather favours this opinion ; though it is clear from the acts of the Council, that the Fathers did not intend to decide the question. The Cardinal de Lorraine even observed, in giving his opinion before the plenary assembly, that this point had been neither proposed nor debated. There were among the theologians of the third section, charged with drawing up the canons relating to marriage, plenty of partisans of the opinion that derives from the ecclesiastical law alone, and not from the vow, the obligation of priests to continency, as well as the corresponding impediment. Thus one of them, John Lobera, said, l.c., p. 256 : « Such a marriage would not be null by reason of the vow, if, e. g., the priest simply pretended to take it... but it is null by the ecclesiastical law which opposes its veto to it, as it does in the case of the prohibited degrees (of consanguinity) ».

frequently happened in those times, though without being of general precept) (1), becomes solemn in the very reception of Orders, and constitutes henceforth a diriment impediment.

Solution of a difficulty.

The *only difficulty* consists in explaining how clerics promoted to major Orders, are, without taking a vow, nevertheless bound *by the virtue of religion* to observe even *internal* chastity, to which, according to the common opinion, they are so bound that they incur the guilt of sacrilege even by a *merely internal* sin of luxury. This is a real difficulty ; for if, on the one hand, the law of the Church is here binding from a motive of Religion, on the other hand, a great many theologians teach that ecclesiastical precepts do not affect purely internal acts.

But the same difficulty has to be faced by those who support the other opinion, since they are forced to have recourse to a law of the Church imposing the taking of the vow of chastity by what is, itself, also an internal act. Besides, apart from the fact that it is probable that the Church has the power of commanding purely internal acts, the obligation of Religion as to internal chastity may be deduced from the fact that, being consecrated and devoted by the Church to a life of continency, the ministers of God become *sacred* persons and, *by reason of their sacred character*,contract the guilt of sacrilege, even by internal sins committed against chastity.

Though it has not been adopted by the majority of writers, especially the earlier ones (2), the opinion held by us counts among its modern supporters SCHULTE, o. c., p. 211 s. ; SCHERER, o. c. II, p. 367 ; SCHNITZER, o. c., p. 468 s. ; SÄGMÜLLER, o. c., p. 238 s. and 601 ; HERGENRÖTHER-HOLWECK, o. c., 257 s. ; OJETTI, *Synopsis* II, n. 2965 ; LEITNER², *Lehrb* , p. 188 ss. ; HILLING, in *Der Katholik*, 1909, I, p. 234 ; DUJON, o. c., p. 172 ; GAUGUSCH, o. c., p. 47 ss., and especially SCHARNAGL, o. c., p. 203-215.

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1. Cf. below, n° 287.

2. Cf. SCHARNAGL, o. c., p. 204 s. ; GILLMANN, in the *Archiv f. k. Kirchenr.*, 1909, p. 182 s. ; 1911, p. 375, and 1912, p. 195. Of modern authors, those opposed to it are, among others, WERNZ, o. c., IV, n° 393 ; LAURENTIUS, o. c. n° 628 ; FEYE, *De Imp.*, n° 505 ; ROSSET, o. c., n° 1648 ; FREISEN, o. c., p. 767 ; SILBERNAGL, *Lehrbuch*, p. 483 ; VAN DE BURGT-SCHAEPMAN, o. c., n° 129, and GILLMANN, l. c., with the authors quoted by him.

BENEDICT XIV, in his Constit. *Eo quamvis*, l. c.,par. 22 s. and *Inter Praeteritos*, 3 Dec. 1745 (P. B.., VIII, p. 72 s.), seems to favour the same opinion, but in this case his authority does not go beyond that of a private teacher, since he neither imposes this opinion authoritatively, nor introduces any new legal provision. Cf. also LEITNER², *Lehrb.*, p. 188.

286. *Discipline of the Greek Church.*

3. Up to the present we have spoken of the *Latin Church* ; for the discipline is not the same in the Church of the *Oriental Rite*. There, Orders are an impediment to subsequent marriage, *though not everywhere held with certainty as a diriment impediment* (1), and in many places it does not bind subdeacons, but only deacons and priests (2). In all cases it is certain that this impediment does not result from the vow, since the Orientals do not take one at the time of ordination ; it is the outcome of the ecclesiastical legislation of the Greek Church, which prohibits or invalidates marriage subsequent to Orders, and by reason thereof.

Observations.

Note. 1. Only the *solemn* vow, to the exclusion alike of Orders (even when solemnized with a vow) and of the simple vows taken in the Society of Jesus, has the power to *dissolve* a marriage *ratum* antecedently contracted, as we have said above in n° 189.

2. *Ordination* to the sacred Orders, *when posterior to marriage*, does not dissolve it, but renders the *use* of it absolutely illicit in the *Latin Church*, as is clear from cap. I, Dist. 32 of the *Decretum* of Gratian (3) ; even the children born of subsequent relations are illegitimate and sacrilegious, as we have seen above, in n° 164. In

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1. It is certainly so for the *Italo-Greeks* (Bened. XIV, *Etsi Pastoralis*, l. c., n° 27), as well as for the Ruthenians, the Maronites and the Roumanians, according to the documents quoted by Gasparri, o. c , n° 593 ; see also Van de Burgt-Schaepman, o. c., I, n°s 124 and 126. In the case of the other Oriental Churches, the controversy still exists at the present day, although on the evidence of Benedict XIV, Const. *Anno Vertente* (*P. Bull.*, VIII, p. 250), « the tribunals of the City of Rome admit the opinion of those who consider such marriages as null ». Cf. Zhishman, o. c., p. 474 s. ; Vering, o. c., p. 906 s. ; Gaugusch, o. c., p. 38 and 54 s.

If, therefore, a matrimonial cause occurred,the solution of which depended on this controversy, it would be prudent to refer the whole matter to the Holy See.

2. Thus among the Maronites the impediment affects only deacons and priests ; among the Ruthenians, priests only ; cf. Silbernagl, *Verfassung*..., p. 364 ; Zhishman, o. c., p. 472 ; Leitner, *Lehrb.*, p. 187.

3. This is on the supposition that the husband received Orders *licitly*, and subject to the conditions and precautions described above in n° 158. But if he was ordained without regard to those conditions, the ordination is indeed valid, but the husband so ordained can, at the demand of his wife, resume conjugal relations and lawfully make use of marriage.

the *Oriental Churches*, at least in the greater part of them (1), clerics raised tho the major Orders, with the exception of Bishops, can continue to make use of marriage duly contracted with a virgin before their ordination (2).

3. The following are the reasons for which the Church imposes upon its ministers celibacy and the prohibition of the use of marriage : « a/ In order to increase the holiness of those who have to teach others both by word and example ; b/ that they may apply themselves more closely to divine things ; c/ that they may be better able to gain the respect and confidence of the faithful ; d/ that they may be able to exercise greater charity towards the poor ; e/ and finally, practise a more ample hospitality ». VAN DE BURGT-SCHAEPMAN, o. c. n° 130. Cf. ZIMMERMAN, *Der Priester-Cölibat und seine Bedeutung für Kirche und Gesellschaft*, Kempten, 1899, p. 111 ss. ; VILLIEN, *Le Célibat*, l. c., p. 817 ss.; AUFFROY, *Le Célibat des prêtres*, in *Etudes*, t. CXXXIII, pp. 8-20.

4. A *dispensation* from the diriment impediment of Vow and of Orders is granted very rarely, only for the weightiest of reasons (3), and only, as concerns the impediment of Orders, to subdeacons, deacons and priests (4), but never, we believe, to Bish-

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1. Some of them are practically introducing celibacy, or even making it obligatory, as the Catholic Armenian Council, held at Constantinople in July 1869, did for the Armenian clergy. Cf. SILBERNAGL, *Verfassung*.... p. 346, and also p. 326, 331 s., 337, 356, 375 s. The Holy See will not admit in North America Ruthenian priests, unless they observe celibacy. See LEITNER², *Lehrb.*, p. 187.

2. BENEDICT XIV, *Etsi Pastoralis*, § VII, n° 26, (*P. Bull.*, I, p. 368 s.), formally declares that this practice is tolerated by the Holy See.

3. Where a dispensation from the *Vow* is granted, which happens even apart from the danger of death, certain precautionary measures are imposed, in particular, departure from the religious order. Cf. VOGT, o. c., p. 101, where he gives the rescript of dispensation. Note also that the impediment by which scholastics of the Society of Jesus are bound, comes to an end by the very fact of legitimate departure from the Order.

4. We do not think there is a single example of dispensation granted in the sacred Order of the priesthood except for reasons of the *public good*. Such, e. g. was the case (in 1554) after the English schism, and after the French Revolution (15 Aug. 1801), during which two thousand priests married, the greater part, however, under compulsion. Cf. VILLIEN, *Le Célibat*, p. 830 ; DUJON, o. c., p. 195 s. The indult of 1888, as is well known, does not include the faculty of removing this impediment.

ops (1). Moreover, when the Church does grant a dispensation (2), it ordinarily restricts it to the present marriage and its legitimate use.

5. A suit of nullity of marriage on the ground of Vow and of Orders is involved in great difficulties, when once it is based on a doubt as to the validity of the profession or of the Orders, or on fear inspired in the reception of the same, so that it is better to refer the whole matter to the Holy See, even in the first instance (3).

287. *Penalties.*

Scholion I. Severe penalties are enacted against those who, after solemn profession (4), or the reception of sacred Orders, forget their duty so far as to attempt to marry (5). These are : a/ they *incur excommunication* reserved to the Ordinary, in virtue of the Constitution *Apostolicae Sedis* (6), and those persons who attempt marriage with them fall under the same censure ; b/ they become *suspect of heresy*, because, in opposition to the definition of the Council of Trent, they apparently look upon such a marriage as valid ; c/ finally, men, in consummating such marriage, become *irregular* (7).

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1. It is a mistake to quote, as is sometimes done, the dispensation granted in favour of Talleyrand, Bishop of Autun. According to the text of the Brief of Pius VII, quoted in ROSSET, o. c., n° 1639, it was rather a question of the return of the Prelate to the lay state, i. e., of permission to dress as a civilian and to hold public offices. Cf. DE LACOMBE, *La vie privée de Talleyrand*, Paris, 1910 ; the account in the *Revue du Clergé fr.*, t. 63, p. 570 etc. Cf. also KUTSCHKER, o. c., III, p. 274 ; VILLIEN, o. c., p. 829.

2. What is the *nature* of this dispensation ? One can easily understand that the Church can remove the impediment in so far as it is *diriment*, since it is of ecclesiastical law ; but in so far as the vow, taken in solemn profession and in Orders, involves a *prohibition* of natural divine law, see what we have said above in n° 172.

3. See WERNZ, o. c., n°s 386 and 403.

4. These penalties do not affect those whose marriage is invalidated by a *simple* vow, such as the scholastics of the Society of Jesus.

5. For an attempt at marriage *civil marriage* is sufficient, even in places where the law of clandestinity is in force. C. S. O., 22 Dec. 1880, ad 1m.

6. « Clerics in sacred Orders, regulars or nuns who, after having taken a solemn vow of chastity, presume to contract marriage, as well as all those who presume to contract marriage with any of the aforesaid persons ».

7. This is the opinion of WERNZ, o. c., IV, n° 572, in opposition to that of GASPARRI, o. c., n° 572.

Historical evolution.

Scholion II. On the **historical evolution** of these two impediments, see ESMEIN, o. c., I, p. 269-301 ; VACANDARD, o. c., p. 71-120 ; WERNZ, o. c., IV, nos 377-389 ; SCHNITZER, o. c., p. 445 s. and 454 s. ; and especially SCHARNAGL, o. c. A brief sketch will suffice us here.

1. The vow.

From the beginning of the Church (1), every vow of chastity, without distinction, rendered marriage *illicit*. Later, from the end of the fourth century (2), a distinction began to be made in relation to marriage, between the *private* vow and the *public* vow. A vow was considered as public whether taken in a private house or in a convent, provided it was made known by the taking of the habit, and especially, in the case of women, by the giving of the veil and the wearing of it in public (3). Persons who, though bound by a *public* vow, nevertheless married, were to be separated, but not those whose vow was private ; this *separation*, it would seem, implied the *nullity of the marriage*, so that a *public* vow of chastity constituted a *diriment* impediment, while a *private* vow was only a *prohibiting* impediment. This diriment power of the public vow does not, however, clearly appear *before the twelfth* century, but it was then formally enunciated, in 1139, in the second Council of Lateran, which also attributes the same diriment power to the major Orders, as may be seen in the text quoted above (4).

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1. Under the *Mosaic* law, the High-priest could marry none but a ***virgin*** (Lev. XXI, 13) ; the other priests could not take to wife a harlot or a prostitute or one that had been put away from her husband (Lev. XXI, 7), nor even, according to Ezech., XLIV, 22, a widow, unless she was the widow of a priest.

2. Before the fourth century, there were only strictly private virgins, without any putting of the veil, and so the distinction between the public and occult vow did not occur. See H. KOCH, *Virgines Christi*, in the *Texte und Untersuchungen*, XXXI-2, pp. 59-112. Cf. also SCHAEPMAN, *De Katholiek*, 1899, I, p. 458-470.

3. Hence virgins are spoken of as *veiled* or *not veiled*. The veiled virgins were said to be *blessed* or not, according as the taking of the veil was or was not accompanied by the episcopal blessing. There is a description of the ceremonies of the blessing of virgins, formerly in use, and of their apparel, in the *N. K. Stemmen*, 1912, p. 346 s. and p. 353-356 ; in the same place, p. 357 ss., their mode of life is described.

4. At the first Council of Lateran (1123) a similar, though less decisive, step had already been taken : « To priests, deacons, subdeacons, monks... we absolutely forbid marriage, and decide... that marriages contracted by such are to be dissolved ». C. 8, D. XXVII. Some years later, in 1135, the local Council of Pisa, held under Innocent II, distinctly affirmed the nullity of marriage subsequent to Orders.

Following on this, there was a considerable period of uncertainty and indecision both in the law and in the universities. The *University of Paris* and its adherents kept the distinction between *occult* and *public* vows, with their respective prohibitive and diriment force. The University of Bologna, on the contrary, with its disciples, adopted the distinction between *private* or *simple* vows and *solemn* vows, that is to say, vows accompanied by certain ceremonies or particular solemnities. It was on these latter lines that the canon law developed. Little by little the required solemnities were more exactly determined, and finally they received their definitive form in the Decretal of Boniface VIII, already quoted. This requires for the *solemnity* of the vow invalidating marriage either the major Orders, or profession, in a religious order approved by the Holy See (1), whether such profession be explicit, or whether it be implicit or tacit, as being contained in the taking of the habit under certain conditions.

At a still later date, were instituted simple vows in the Society of Jesus, which, as an exception to the general rule, were given the power of invalidating marriage.

Finally, on the 12 June 1858, Pius IX suppressed *tacit* solemn profession for men (2), keeping only explicit or express profession (3). Many authors regard this discipline as equally applicable to nuns and to those who make their profession under simple vows (4).

2. Orders.

During the first three centuries, we do not meet with any ecclesiastical law prescribing the continency of the clergy. The entire regulation consisted in not ordaining those who had married more than once, and in prohibiting marriage after Orders ; but clerics married before their ordination, were free to continue the use of their married state. There were, in fact, some who, for the love of perfection, observed conjugal continency, especially

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1. At the time of Boniface VIII and for long after, every profession made in an approved religious order was *solemn* ; no simple vows were taken in those orders.

2. Under the discipline of the Decretals, the taking of the Religious habit, in certain requisite conditions, constituted *tacit* solemn profession. Hence the saying : « *The habit makes the monk* », which was formerly strictly interpreted. Later its application became less rigorous and it was contradicted by the legal rule : « *The habit does not make the monk, but profession* ». See ESMEIN, o. c., I, p. 279 s. ; SCHARNAGL, o. c., p. 67 s. ; SCHERER, o. c., II, p. 803 s., and note 32.

3. See VERMEERSCH, *De Religiosis*, I, n° 208, II, p. 354 s.

4. See WERNZ, o. c., IV, n° 376, note 7, where he appeals to the decree of the S. C. of Bishops and Regulars, of 3 May 1902, in the *Acta S. S.*, t. XXXV, p. 31 ss.

many of the Bishops, who were, moreover, ordinarily chosen from among celibates of irreproachable morals. They were known as εὐνουχοι (1).

It must not be supposed that the wishes of the early Church did not go beyond this ; but it was not considered expedient to issue a strict and universal law, in the first place, apparently, on account of the strong dislike that the Judaeo-Christians had for sterility, and secondly, because the Roman law itself made celibacy penal.

From the beginning of the fourth century :

a/ In the *Latin Church*, the obligation to celibacy came into force, in this sense, that at that time the law enjoining continency on those clerics who were already married, began to be introduced, though not everywhere with the same strictness. We may mention the Councils of Elvira (300) (2), of Rome, under the pontificate of St Siricius (387) (3), the 2nd and 5th Councils of Carthage (390 and 401), canons 2 and 3 respectively (4). Up to that time subdeacons did not fall under the law (5), but, in the middle of the fifth century, Leo I expressly subjected them to it (6) ; on this point, however, the ecclesiastical law still fluctuated for a considerable time. Cf. Leitner², *Lehrb.*, p. 192.

The married clergy were not at first forced to put away their wives ; on the contrary, they were, in the beginning, counselled to keep them and to live together as brothers and sisters. From this, such wives were known as episcopissae, presbyterae,diaconissae and subdiaconissae(Vacandard, o. c., p. 107 and 101). But, in the sequel, experience showed that such cohabita-

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1. H. Leclercq, o. c., p. 1329 s. ; Gaugusch, o. c., p. 5 ; Dujon, o. c., p. 37 ss. ; Funk, o. c., who especially combats the opinion of Bickell, according to whom the imposition of continency on clerics is an apostolic prescription.

2. Canon 33 : « We have judged it good to ordain absolutely that Bishops, priests, deacons, and all clerics charged with the ministry, should observe conjugal continency and abstain from procreating children... ». Hefelé-Leclercq, o. c., I¹, p. 238 s.

3. Cf. the epistle of Pope Siricius to Himerius, ch. 7, in Hardouin, o. c., I, col. 849 s., and his letter to the Bishops of Africa, ch. 9, *ibid.*, col. 857 s. Cf. Hefelé-Leclercq, o. c., II², p. 71 s.

4. Hardouin, o. c., I, col. 951 and 987 ; the following is the 3rd canon of the 5th council : « We have judged it good that Bishops, priests and deacons observe also conjugal continency, according to the former decrees (of the second council) ; and that, if they do not do so, they be deposed from their ecclesiastical office ».

5. The Epistle of Siricius, e. g., and the canons of the councils of Carthage mention deacons, but stop there.

6. Letter to Anastasius of Thessalonica, ch. 4, in Hardouin, o. c., I, col. 1767 ; compare with the letter to Rusticus of Narbonne, Inqu. 3ª ; *ibid.*, col. 1761.

tion was too dangerous, and separation was imposed. Further, as SCHARNAGL, o. c., p. 26 ss., GAUGUSCH, o. c., p. 12 s., and SCHNITZER, o. c., p. 462 s. and p. 464, note 4, show, the local law in certain countries began to require from candidates for Orders the preliminary vow of chastity (which, as we have seen above, Boniface VIII afterwards declared to be solemnized by the reception of Orders); and, finally, subsequent marriage was declared *null* by the first Council of Lateran (1123), and more distinctly still by the second (1139). See the texts quoted.

b/ The *Greek* Church, in the Council *in Trullo* (692) gave the force of law to the original customs. With it, Bishops were required to be celibates, or, if married, to separate from their wives (1); the rest of the clergy in major Orders could not marry after ordination (2), but they could continue to make use of a previous marriage, that is to say, of a first marriage contracted before ordination with a virgin, not with a widow (3). This is the present discipline, still in force in the Schismatic Greek Church and also in some of the United Greek Churches. See above, n° 286.

Scholion III. Civil legislation in France (4) and Belgium (5) recognises neither the vow nor Orders as an impediment to civil marriage, though *formerly* this latter was admitted by the French law (6). It is otherwise in Austria and in Spain, where these two impediments are recognised by the civil authority. See WERNZ, o. c., IV, n^os^ 273 and 410 (7); *Le Régime des Cultes*, p. 110. *Civil law.*

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1. Can. 12 and 48, in HARDOUIN, o. c., III, col. 1664 s. and 1679.

2. Can. 6, *ibid.*, col. 1662.

3. Canon 13, *ibid.*, col. 1666. It is there also ordained : « that subdeacons, who come in contact with the sacred mysteries, and priests must abstain in their turn from conjugal relations », that is to say, on those days on which their turn occurs to officiate at the altar. Cf. SILBERNAGL, *Verfassung...*, p. 376; ZHISHMAN, o. c., p. 458 s.; VERING, o. c., p. 907.

4. See ALLÈGRE, o. c., I, p. 77, and GILBERT, o. c., p. 61 ss.

5. See HUYTTENS, o. c., I, p. 597; LAURENT, *Principes de droit civil*, I, p. 369.

6. If, after the Revolution, religious profession was no longer considered as an impediment, Orders were practically recognised as such by the tribunals, under art. 6 and 26 of the Concordat, and even under the Code Napoléon. Cf. PLANIOL, o. c., n° 741; DUJON, o. c., pp. 198-220; GILBERT, o. c., 1re partie. In this author will be found many judgments and decisions to the effect that clerks in holy Orders are incapacitated from civil marriage. The decision of the Cour de Cassation de Paris, of 25 Jan. 1888, to the effect that Orders do not constitute a civil impediment, has since been followed in legal practice.

7. The same author observes that a cleric in sacred Orders is incapable of contracting marriage before the Austrian law, *even if he has left the Catholic religion*. But the *Th. Pr. Quartalschr.* (Lintz), 1908, p. 916, quotes a decision of the

Article 5. The Impediment of Disparity of Worship.

Meaning.

288. *Meaning.* It is necessary *to distinguish* carefully between disparity of worship and mixed religion, though these two impediments are often included under the same denomination (1). The latter exists between two baptized persons, of whom the one is a Catholic and the other a non-catholic, and it constitutes only an impedient impediment. On the contrary, disparity of worship supposes two persons *of whom one is baptized and the other is not ;* it makes no difference if the baptized party be a heretic or schismatic, or even if both parties be such. Thus, this impediment may perfectly well exist between two protestants or two schismatics, of whom the one has been validly baptized and the other not. Disparity of worship is not, then, based on diversity of profession of faith, but on the reception of the sacrament of baptism by one of the parties and not by the other (2).

Law in force.

I. *Disparity of worship constitutes an impediment of ecclesiastical law, invalidating marriage between a party that is baptized and one that is not.*

Explanation.

289. *Disparity of worship is a diriment im-* 1. Disparity of worship, *by the ecclesiastical law, invalidates* marriage, and, by the *natural divine* law, renders it *illicit*, at least as a

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civil tribunal to the contrary effect, deciding that the impediment binds the cleric only *so long as he remains in the Catholic Church*, which prescribes celibacy. A yet more recent decision has been given in the same sense, 11 Jan. 1910 ; see the *Archiv f. k. Kirchenrecht*, 1910, p. 164 s. ; 584 ss. See also Leitner², *Lehrb.*, p. 197 s.

1. Thus the S. Congr. Consistor., in its decree on the competence of the C. S. O. in the matter of *mixed* marriages, understands by this word marriages between persons of different and disparate religions as well as of mixed religion. See the *Collat. Brug.*, t. XV, p. 251 s., and below, n° 351.

2. This is what Benedict XIV says, Constit. *Singulari Nobis*, 9. Feb. 1749 (P. B., VII, p. 10 s.), § 11 : « This impediment does not occur in the marriages of those who have not received baptism, though both parties are the adherents of a false religion : neither does it exist in the marriages of those who have received baptism, though one be a Catholic and the other a heretic... But it undoubtedly exists in the marriages of those persons of whom the one has been baptized and the other has not been, even though he be a catechumen ».

general rule. Unions of this kind ordinarily result in very grave evils, and this is why they are strictly forbidden by the natural divine law, even more so than mixed marriages (1). If, however, in a particular case, the prohibition of the natural law loses its force, owing to the absence of those dangers upon which it is founded, there always remains the invalidating prohibition of the ecclesiastical law, based on the presumption of universal danger (2). *pediment of marriage of the ecclesiastical law,*

2. This law of the Church has not been established by any special provision, but *by custom* (3) ; still it is universal in its scope (4), with the exception, perhaps, of the case in which its observance would be impossible, as, for example, the case of Christians stranded on some island where they could only marry with infidels, without any possibility of obtaining a dispensation (5). *introduced by custom.*

The impediment of which we are speaking affects *directly* the baptized party, and thereby the unbaptized party *indirectly*, in this way, that, as the former is incapable of contracting the marriage in question, the other party is consequently also incapable of doing so (6).

290. Doubtful baptism is held as valid in respect of the marriage.

II. *In case of doubt as to the validity of the baptism, if after examination the doubt still remains* (7), *we must apply the principle : A doubtful baptism is held as valid with respect to the validity of the marriage.*

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1. See above, n° 252.

2. *Ibid.* Thus, in the case of a marriage between a baptized party and a *catechumen*, there would remain only the *canonical* impediment.

3. Benedict XIV, Constit. *Singulari Nobis* (P. B., VII, p. 10 s.), § 10, declares that « marriages are invalid on the ground of disparity of worship, not by the ordinances of the sacred canons, but *by the universal custom of the Church*, which has existed for many centuries and *has the force of law* ». Cf. the *Conférences de Paris*, o. c., III, p. 11 s. ; and below, n° 292. As to the power of custom to introduce a diriment impediment, cf. c. 3, X, IV, 11.

4. *ibid.*, § 18-19, where the Sovereign Pontiff shows how this law is obligatory throughout the whole Church, without excepting those countries in which a contrary custom may, perchance, exist ; for, he adds, « a particular custom must give way to a universal contrary custom ».

5. See above, n° 238, in note.

6. See the above-named Constit., § 8.

7. Numerous Roman decrees, quoted in part below and in part in the *Collat. Brug.*, VII, p. 24 ss., make this examination for the purpose of removing the doubt,

Explanation.

This principle is universally admitted, and has been repeatedly inculcated by the Holy See ; but authors are so greatly at variance as to the sense and extension to be given to it that, as WERNZ says, o.c.,n° 507, note 28, it is all but impossible to imagine greater contradiction (1).

Two opinions are particularly prominent :

According to the *first*, doubtful baptism is *presumed* to be valid ***in relation to the validity of marriage***, with a presumption that cannot be controverted *(juris et de jure)*, and that admits of no proof to the contrary. Consequently, whatever may be the marriage already contracted or to be contracted, we must judge of its *validity* as if the doubtful baptism were really valid, *even if, in the sequel, it is discovered that it was given in an invalid manner* (2). Moreover, the

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obligatory in each particular case. As to the manner of conducting the inquiry, and the presumptions that may be admitted in favour of the baptism, consult especially the *Instr.* of the C. S. O., of 1 Aug. 1883, in the *Collectan.*, n° 662. See also the Letter of Cardinal Ledochowsky to the Bishops of America, in the *N. R. th.*, 1902, p. 204 ; and VAN DE BURGT-SCHAEPMAN, o. c., n° 133, p. 168 s.

1. Bearing on this controversy are : the decree of the C. S. O., 29 Sept. 1734 (GASPARRI, o. c., n° 598) ; reply of the S. C. C., in the *Causa Tarvisina*, 4 March 1737 (*ibid.*) ; the decree of the C.S.O.,17 Nov, 1830 (*N. R.th.*,XV, p.396) ; the decree of the C. S. O., 20 Dec. 1837 (*ibid.*,p. 398) ; the decree of the C. S.O., 20 July 1840 (*ibid.*, p. 401) ; the decree of the C. S. O., 29 Apr. 1842 (Collectan.², n. 948) ; the decree of the C. S. O., 5 Feb. 1851 (*N.R.th.*, XV p.398) ; the decree of the C.S.O., 1868 (*ibid.*, p. 402) ; the reply of the C.S.O., 3 Aug. 1873 (*ibid.*, p. 399 s.) ; the decree of the C. S. O., 3 Apr. 1878 and the annexed letter of the Secretary (WERNZ, o. c., n° 507, note 29) ; the decree of the C. S. O., 7 July 1880 (GASPARRI, o. c., n° 603) ; the decree of the C. S. O., 1 Aug. 1883, l. c. ; the reply of the C. S. O. to the Bishop of Munich, 18 Sept. 1890 (*N. R. th.*, XXIII, p. 522 s.) ; the Instr. of the C. S. O.. 4 Feb. 1891 (A. S. S., XXVI, p. 62 s.) ; the reply of the C. S. O., 3 Apr. 1893 (WERNZ, o. c., n° 508, note 31) ; the decree of the C. S. O., 10 June 1896 (*Collectanea*², n° 1940) ; the letter of Card. Ledochowsky, l. c. See also the Instr. of the C. S. O., 5 June 1889 (*Collectan.*, n° 1575) together with the interpretation given by Card. Ledochowsky to the cases proposed by the Bishop of Helena, 11 May 1900, in DE BECKER, *De Matr.*, p. 238 s.

2. According to this opinion, therefore, if the baptism of one of the parties is certain and that of the other doubtful, the marriage must be regarded as valid ; the same holds good, if the baptism of both parties is doubtful, even if the nullity of one of them is afterwards discovered. On the other hand, the marriage must be regarded as null, if one of the parties is certainly not baptized and the

faithful are *permitted* to contract marriage with a party whose baptism is doubtful (1). We must also decide in favour of the *licitness* of a marriage to be contracted between persons whose baptism is doubtful on either side, but not between an unbaptized person and one doubtfully baptized, since such a marriage would even be invalid.

According to the *second opinion*, doubtful baptism is presumed to be valid in relation to the validity of the marriage, with *only an ordinary presumption (juris tantum)*. It consequently results from this that the baptism is considered valid, relatively to the marriage *so long as the doubt as to its validity continues to exist*; but that this presumption *eventually falls, when the contrary fact has been duly established*, so that, if later on the nullity of the baptism is discovered, the validity of the marriage would have to be judged in accordance with this nullity.

Among the partisans of this latter opinion, some do *not* apply the principle to marriages *to be contracted*, but only to marriages already contracted, and consequently they regard as *illicit* the contracting of marriage between a baptized person and one whose baptism is doubtful (2); others apply the principle both before and after the marriage, and draw their conclusions accordingly (3).

This *latter view* is the one that we prefer, and we are therefore of opinion that, relatively to the validity of the marriage, whether *contracted* or *projected*, a *presumption juris tantum* must be admitted in favour of the doubtful baptism; consequently, in our opinion, a *contracted* marriage, between a baptized person and one whose baptism is doubtful, is presumed to be valid *as long as the doubt subsists*,

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baptism of the other is doubtful. The reply of the C. S. O., 20 July 1842, to the case proposed by the Vicar Apostolic of Calcutta, was to this effect (Victorius ab Appeltern, o. c., 167 s.), as well as that to the doubt proposed, 14 July 1882, ad 1m.

1. This is the opinion of Gasparri, o. c., nos 597 ss., and of Leitner², *Lehrb.*, p. 279 s.

2. This is the opinion of De Becker, *De Matr.*, p. 236 ss.; see also the *N.R. th.*, XXXI, p. 656 ss.

3. Wernz, o. c., no 507 s.; Van de Burgt-Schaepman, o. c., nos 133 s.; Vlaming, o. c., I, nos 234 s.

and, moreover, a marriage *to be contracted* (1) is also presumed to be *valid* and *licit*, at least as a general rule, and when the material fact of the baptism is certain.

by a presumption juris tantum et non juris et de jure ;

This is our line of argument :

1. The presumption in question is, for us, a *presumption juris tantum*, which gives way to the truth when established to the contrary, i. e., when the nullity of the baptism is subsequently discovered. It seems to us that this may be deduced from various Roman utterances, and especially from the decrees already quoted, of 1830, ad 3m (2), of 5 Feb. 1851 (3), of 5 June 1889 (4) ; from the decree of 29 April 1842 (5), and from the letter of Cardinal Ledochowsky in reply to the cases proposed by the Bishop of Helena in 1900 (6) ; compare with the *Causa Parisien.*, of 13 June 1911, in the A. A. S., III, p. 399 s.

Undoubtedly the Church *could* make the presumption in favour of the baptism a presumption *juris et de jure*, so that a doubtful baptism would always entail either the validity or the nullity of the marriage, according to circumstances (7) ; but the documents cited show that it has acted otherwise in the matter.

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1. Again, we must say the same of marriage to be contracted between persons both of whom are doubtfully baptized ; on the contrary, a marriage projected between an unbaptized person and a doubtfully baptized Christian is evidently presumed to be invalid, and on that ground strictly prohibited.

2. The C. S. O., on being asked if their doubtful baptism made Calvinists and Lutherans subject to the impediments of disparity of worship, replied in the first place, ad 2m, that in the case in which the doubt still remained after examination, the Baptism is to be considered as valid in relation to the validity of marriage ; but in the second place, ad 3m, it added : « But if the baptism is discovered to be certainly null,... the marriage is null ».

3. « In general, Dutch Protestants, converted to Catholicism, are to be considered, on the ground of their baptism, as validly married, *unless it be certain and evident*, in a particular case, that the baptism in question was really null ».

4. « Where it is a question of the impediment of disparity of worship, and where it is evident that one of the parties has been baptized and the other not,... the marriage may be declared null by the Ordinary ».

5. *Collectanea*2, nº 948, ad 1m.

6. On the subject of the consultation addressed to the S. C. de P. F. by the Bishop of Helena, on the force and extent of the Instr. of 1889, and of the letter of Card. Ledochowsky relating to that matter, see De Becker, o. c., p. 238 s.

7. That is to say, in the case in which the baptism of one of the parties was certain and that of the other doubtful, the Church might cause the impediment

Besides, as De Becker very rightly remarks, *De Matr.*, p. 239, if the contrary opinion, maintained by Gasparri, were put in practice, many difficulties would be encountered. For, if every marriage contracted with a positive doubt as to the validity of the baptism be definitively declared valid, it will often be difficult to determine if the doubt was sufficiently probable, if the preliminary inquiries were sufficiently detailed, and so forth.

which applies also to marriages to be contracted.

2. The presumption of validity of doubtful baptism in respect of marriage is, in our opinion, generally to be extended even to *prospective* contracts. The decrees on which we rely nowhere make any restriction, nor do they distinguish between marriages contracted and to be contracted ; on the contrary, several make explicit mention of marriage to be contracted ; such are, among others, the decrees of the C. S. O., of 1868 (1) and of 1890 (2). Besides, the presumption which here militates in favour of the act performed, does not directly concern the marriage, but rather the baptism, and consequently favours indifferently the contract already made or that which is only projected.

But if the baptism is to be considered as valid in relation to the marriage *to be contracted*, what does this mean, except that the marriage may be celebrated just as if the baptism were certainly valid ? Consequently it is only logical to conclude that, as a general rule, it is *lawful* for a baptized party to marry a person whose baptism is doubtful, just as if the same were certainly baptized,

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of disparity of worship never to intervene, so that, on this ground the marriage would always be valid ; and, on the contrary, it might always apply it in cases of marriage contracted or to be contracted between a party certainly unbaptized and one whose baptism is doubtful.

1. To the question proposed : « If the doubt as to the validity of the baptism subsists, and it has not been judged expedient to decide this question of doubtful baptism, must one, in what concerns the marriage, consider the interested parties as really and validly baptized ? », the decree replies, ad 3m : « The baptism is to be considered as valid relatively to the validity of the marriage ».

2. The Bishop of Munich sought from Rome a declaration to the effect « that by a dispensation from the impediment of mixed religion, in the case in which the doubt continues to exist as to the validity of the baptism of the heretical party,... should be understood at the same time a dispensation from disparity of worship granted *ad cautelam* » ; but the C. S. O. replied afresh by affirming the principle of the validity of baptism in relation to the validity of marriage, and referred to the decrees of 1830 and of 1868.

and that there is no impediment of disparity of worship.

We are further confirmed in our opinion by the practice of the Holy See, which often refuses to dispense *ad cautelam* from disparity of worship, in a case of doubtful baptism, even when this dispensation is expressly asked for at the same time as that from mixed religion [1].

An objection answered.

It might be *objected* [2] that the marriage to be contracted under these conditions remains *doubtful*, notwithstanding the presumption alleged, and is consequently exposed to the danger of nullity, since in our opinion the presumption yields to the ascertained fact, and the Church does not make good the defect [3].

Our answer to this is that it is not absolutely forbidden to expose marriage to the danger of nullity, but that it is lawful to do so *whenever a grave reason requires it* [4]. But is it not a grave reason, that the Church is thereby enabled to maintain more effectively and more universally its principle: that those whose baptism is doutbful are subject to the ecclesiastical laws, and in particular to the marriage impediments, a principle which it vindicates once more in the decrees of 1880 and of 1891? Moreover, in permitting the marriage, notwithstanding the positive doubt as to the validity of the baptism after inquiries have been made, has not the Church found fitting and effective means

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1. It is inaccurate to say with Lehmkuhl, o.c., II, p. 572, that, in the dispensation from mixed religion, a dispensation from disparity of worship is implicitly given, as far as that is necessary. The decree of 1890, to which we have just referred, rejects this interpretation; and the decree of 29 Apr. 1842, ad 2m, is even more explicit: it replies in the negative to a question couched in the following terms: « Does the Holy See intend to dispense also from the impediment of disparity of worship, when it gives a Catholic party a dispensation to contract with a non-catholic party? ».

2. As De Becker says, o. c., p. 237: «The celebration of marriage is illicit while there subsists a grave doubt of fact as to the existence of an impediment, unless it is certain that the Church supplies in the contingency. But,.... here it is certain (from what has been said) that the Church intends neither to dispense nor to supply ».

3. The Church does not supply here in virtue of the common law, since this doubt as to the existence of the impediment of disparity of worship is one *of fact*, i. e., bearing on the existence of valid baptism.

4. See above, nº 240, in 2.

of inducing parish priests and Bishops to make serious inquiries as to the validity of the baptism in each particular case ? This inquiry, on the obligation of which the Holy See so frequently and so strongly insists, would be too readily omitted if recourse could always be had to a dispensation *ad cautelam*, and such a dispensation would be sought even when the doubt was purely negative (1). See the decree of the C. S. O., of 1873, as well as the Letter of Cardinal Ledochowsky to the Bishops of America (N. R. th. XXXIV, p. 204 s.), reproving this abuse.

Two restrictions.

In the course of this controversy, we have made *two restrictions*. a/ The first is that marriage to be contracted under these conditions, is to be considered as licit *as a general rule*, and consequently, that there may be certain circumstances of time and place, the judgment of which the Holy See reserves to itself, in which an exception might be made to the rule.

We can thus understand how the document quoted by De Becker, p. 240, states that recourse must be had to Rome in particular cases, and also how a dispensation *ad cautelam* is from time to time granted together with the dispensation from mixed religion (2).

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1. This twofold motive seems sufficient to make permissible a marriage of doubtful validity, and to cause a doubtful baptism to be regarded as valid *in respect of a marriage to be contracted*. Nevertheless these motives do not suffice for the omission of conditional baptism, or for holding doubtful baptism as valid *in relation to the attainment of eternal salvation ;* for in this case it is a question of a condition of salvation required *necessitate medii*, while if it is afterwards discovered that the marriage is null, there will be no difficulty in remedying the matter. This is why the decrees that we have quoted, especially the replies given in 1734 and in 1737, carefully distinguish between the two questions. On the one hand, it is there stated that the baptism is to be regarded as valid in relation to the validity of marriage ; and on the other hand, that it is to be considered as doubtful as concerns its repetition *sub conditione* : that is to say, *that it must be repeated* sub conditione, *without prejudice to the validity of the marriage.*

Should circumstances change, there is no reason why the Church should not also modify its present discipline. It would be sufficient that the motives, that it hitherto regarded as sufficiently grave to justify it, should later, in view of the changed state of affairs, appear insufficient for maintaining it.

2. The Bishop of Bruges, on the 27 Aug. 1908, received a rescript of this kind, wherein the S.C.Inquisit. dispensed in commissarial form, in favour of the prospective Catholic bride, N. N., « from the impediment of mixed religion, and *ad cautelam* from *disparity of worship*, to enable her licitly and legitimately to

b/ We have also said that the rule must, perhaps, be restricted to the case, which is in fact the most common, in which the doubt bears on the *validity* and not on the *fact* of the baptism ; this latter restriction will be the more readily admitted, in that it agrees better with the arguments employed, in that the above-mentioned decrees are most frequently concerned with the question of law, and, finally, in that the decrees of 1893 and of 1896 expressly specify that it is not a question of fact (1).

Practical conclusion.

Practical conclusion.

1. In the case in which a marriage *is to take place* at an early date between a baptized party and one whose baptism is doubtful, if after serious inquiry the doubt remains, and cannot be removed by the repetition of baptism *sub conditione*, the matter should be set forth in the petition that has to be forwarded to Rome, and a dispensation *ad cautelam* from disparity of worship, as far as it is necessary, should be asked for (2). If the Holy See refuses it or omits it from the rescript, and grants only the dispensation from mixed religion,there is no reason why the celebration of the marriage should not be proceeded with, at least when the doubt affects only the validity and not the fact of the baptism (3).

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contract marriage with N. N., a non-catholic, *whose baptism was doubtful* » ; the prospective bridegroom being an Anglican of the Low Church section. Since that date, several similar rescripts have been granted (even when in the *supplica* reference was made to the principle of regarding doubtful baptism as valid in relation to marriage), so that the Holy See seems to be at present more easy than formerly in the matter of these dispensations *ad cautelam*. We know also that in the course of the year 1912, at the instance of the Ordinary of Bruges, such a dispensation *ad cautelam* was granted, although in the petition explicit allusion was made to the principle of holding doubtful baptism as valid in relation to marriage.

1. Undoubtedly the decree of 1880, as well as that of 1 Aug. 1883, seems to say the contrary, and to teach that the principles and conclusions concerning doubtful baptism in relation to marriage, are identical whether for questions of law or of fact. But we must adhere to the rule more recently laid down.

2. According to some authors, the Bishop himself can dispense from this impediment, inasmuch as it is doubtful, though it be public both of its nature and in fact ; but in practice this opinion is less safe ; see below, nº 356.

3. Hence we see what rule is to be followed in the case by a Bishop who has an indult empowering him to dispense from disparity of worship or from mixed religion, or from both impediments. Namely, if he can dispense from disparity

2. If the *doubt* as to the baptism does not arise until *after the marriage has been contracted*, the marriage will be considered as valid as often and as long as the baptism remains doubtful for both parties, or doubtful for one of them and certain for the other (1). It will be reckoned as null, if the baptism of one of the parties is doubtful and that of the other certainly invalid ; nevertheless, in this second hypothesis, it should not be declared null without recourse to the Holy See.

3. If, *after the marriage has been contracted*, it is discovered that the baptism is certainly *invalid* (and it makes no difference whether the marriage has taken place with or without a doubt as to such validity), then the validity of the marriage must be judged according to the objective invalidity of the baptism (2). Nevertheless the Bishop will prudently abstain from declaring the nullity of the marriage before having had recourse to the Holy See, unless the invalidity of the baptism is perfectly evident (3).

291. *This impediment may be removed by a dispensation,*

III. *The impediment of disparity of worship may be removed by a dispensation. But before that is granted, in addition to a proportionate cause, the ordinary conditions and fitting guarantees must be exacted ; moreover, in the actual celebration of marriage between persons of disparate worship, the rules in force for the celebration of mixed marriages must be observed.*

Explanation.

1. The impediment removed by the dispensation is the prohib-

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of worship, he should dispense *ad cautelam ;* if he has only the power of dispensing from mixed religion, and does not think it desirable to have recourse to the Holy See, there seems to be no reason why he should not dispense in the matter of mixed religion, and permit the celebration of the marriage.

1. Thus, 2 June 1910, to the case proposed by the Bishop of Bruges, the C.S.O. replied : « the marriage must be considered as valid ». It was a question of a marriage contracted between a Catholic and a Protestant who affirmed that he had been baptized as such. There was no written evidence of this baptism, but only a strong presumption based on the practice of the man's family of having all the children baptized, and there was no reason to suspect that an exception had been made in this instance.

2. Consequently it will have to be considered as valid, if both the parties are unbaptized, or both are properly baptized ; and as invalid, if only one of them is baptized.

3. Cf. the decrees of 1837 and of 1851.

iting and diriment impediment *of the canon law ;* but the previous removal of the *prohibition arising from the natural divine law* is necessary, which prohibition is based on the dangers that unions of this kind ordinarily entail, principally the danger of perversion. This is why the observance of the clauses of which we have spoken, above, n^os^ 253 s., must be previously exacted.

under the ordinary conditions and guarantees.

2. These *conditions* are the same three as those that we there explained, when speaking of the dispensation from mixed religion, namely : absence of danger of perversion for the baptized party, Catholic education of all the children, and the duty of the baptized party to strive for the conversion of the other ; to these three conditions is often added a fourth, that of not appearing, either before or after the marriage, before any non-catholic minister. This clause is added especially when the unbaptized party is a Jew, to prevent the appearance of the parties before the rabbi (1).

What we have said above, in n° 254, concerning the precautionary measures to be taken in the case of a dispensation from mixed religion, is also proportionably applicable here.

Namely, a) The three customary conditions are required by the natural law, and so the exacting and acceptance of them is by the general rule necessary for *licitness*.

b) In dispensing, the *Holy See* can have regard to the *twofold restriction* made in the same place : both as to the condition of obtaining the conversion of the unbaptized party, and as to the case of urgent necessity, in which a dispensation might be granted by the Holy See in favour of the well-disposed baptized party, in the case of a marriage already contracted or to be contracted (2),

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1. Formerly there was inserted in the rescripts and indults a clause excepting *Italians* ; we have spoken of this in n° 254. In former times also in the rescripts and concession of faculties, *Jews* were ordinarily excepted, but nowadays a dispensation is more readily granted in their regard, and a dispensation can be given in their favour even in virtue of an indult, at least when there is danger in delay. For the restriction inserted in the concession of powers for places where infidels outnumber Christians, see the decree of the S. C. de P. F., 14 Jan. 1906, in the *Collectan.*, n° 1270.

2. A dispensation in favour of the well-disposed party might be more readily granted here than in the case of a mixed marriage, since the validity of the marriage depends upon it.

notwithstanding the bad disposition of the unbaptized party, when there is no danger of perversion (1).

c) This twofold restriction cannot be applied in the case of a dispensation granted *in virtue of an indult* or *rescript*, in the text of which mention is made of the three precautionary conditions. Therefore, a Bishop could not, even in articulo mortis, make use of an indult for the purpose of dispensing a well-disposed baptized person, when the unbaptized party refused to observe the conditions (decr. C.S.O., 16 Apr. 1906, confirmed 21 June 1912, in the *A.A.S.*, IV, p. 442) ; but he could (as also could a parish priest or any priest) make use of the faculty that he has for dispensing the dying, the text of which faculty does not demand the observance of the precautionary conditions. Cf. Besson, *N. R. th.*, 1912, p. 11 s.

d) What has been said as to the necessity of exacting and accepting the conditions for the *licitness* of a dispensation granted in virtue of an indult, holds good with regard to the *validity* of the same (2). For in the decree of the C. S. O., 21 June 1912 (*A. A. S.*, IV, p. 443), it is expressly stated that a dispensation is *null*, when it has been « granted in the matter of the impediment of disparity of worship, by one having power from the Holy See, without the exaction, or with the refusal of the precautionary conditions ».

3. In what concerns the sufficient *cause* for obtaining a dispensation, we refer the reader once more to the same paragraph, n° 255 ; but with this observation that, ordinarily and logically, a graver cause is required for a dispensation from disparity of worship than for one from mixed religion.

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1. If the danger of perversion exists, the dispensation can never be granted, not even for the revalidation of a marriage already contracted. In such a case, however, the baptized party must be left in good faith as concerns the nullity of the marriage, as the *Instr.* of 15 Sept. 1760, cited in the *N. R. th.*, XV, p. 425, prudently observes.

2. It may be doubted whether a dispensation granted *in virtue of an indult* would be *invalid* without the condition regarding the obtainment of the conversion of the unbaptized party. The reason of this doubt appears in the *Folium* to the *Causa Baltimoren.*, 30 June 1910 (*A.A.S.*, II, p. 595 s.), in which it is said that this condition « belongs rather to the precept of charity », and so is not a special imposed condition, and that it is not absolutely necessary for the substance of the dispensation ; it is here a question of a dispensation in virtue of an indult. See Besson, *N. R. th.*, 1913, p. 12 s.

4. The rules for the *assistance* of the parish priest at marriages of this kind are the same as in the case of mixed marriages (see n° 257), save for the following restriction : contrary to what was then said, in the present instance the priest can never assist when a dispensation has been refused ; since this dispensation is required for the very validity of the marriage, and it would be quite useless for him to be present at the ceremony.

5. Finally, if, after a marriage *contracted* without dispensation, it is found that it was celebrated *invalidly* on the ground of disparity of worship, and if (as is generally the case) it is deemed desirable to proceed to the revalidation of the marriage, it is necessary, as a preliminary, to obtain a dispensation, after having exacted the clauses and conditions mentioned above, but at the same time taking into account the mitigation of the discipline, of which we have just spoken under 2.

If the unbaptized party refuses to renew his consent, one may, under certain conditions, obtain a *sanatio in radice*.

Special effect of this dispensation.

Note. 1. According to the decree of the C. S. O., of 16 Dec. 1824 (A. S. S., XXV, p. 583), « the Church in dispensing the Catholic party from disparity of worship in order that the said party may be able to marry an infidel, is understood also to dispense the same from those other impediments which are not binding on the unbaptized, so that the exemption of the latter may be communicated to the former, in view of the altogether exceptional union produced by the contract ». This extension of the dispensation to the other contingent impediments of the ecclesiastical law is, however, confined to relative impediments only (1), and to those alone from which it is customary for the Church to dispense, as we shall have occasion to remark further on (2). Moreover, the impediment of *clandestinity* is an exception to the rule, in accordance with what we have said in n° 78 ; a dispensation from disparity of worship does not imply a dispensation from the formalities required by the Decree *Ne Temere*, though the unbaptized party be exempt from them.

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1. Thus the impediments of Vow and of Holy Orders are absolute impediments, and are not considered as contingently removed by a dispensation from disparity of worship.

2. See n^{os} 300, 306 and 328.

2. *Faculties* to dispense from disparity of worship are not ordinarily granted in our countries, except for the case of one keeping a concubine, *in articulo mortis*. To such, in virtue of powers obtained in 1888, a dispensation may be granted by Ordinaries and by subdelegated parish priests, and even by a simple priest, in the case of article VII of the Decree *Ne Temere*, as we shall point out in n° 369.

292. *Ancient discipline.*

Scholion I. Under the *Mosaic law* certain provisions prevented the Hebrews from marrying with foreigners, though, apparently, not under pain of nullity (1). In like manner St Paul (2), and later the Fathers (3) and the Councils (4) frequently urge Christians to avoid marriage with infidels, but here again these prohibited marriages were not null, and if certain decrees declared them invalid, that was only in consequence of local legislation, not of the universal law. But subsequently, towards the *twelfth century*, general practice looked upon disparity of worship as a diriment impediment, and this universal custom obtained the force of common law (5).

Civil law.

Scholion II. The Code Napoléon makes no mention of the impediment of disparity of worship. Scarcely anywhere is this impediment recognised by the State, except, to a certain extent, in Austria, where the impediment finds a place in the code, though not in full conformity with the canon law. The law there annuls marriage between those who profess the Christian religion and those who do not, in such a way that this impediment is based on the different *profession of faith*, and not on the presence or absence of the *sacrament of the faith*. See WERNZ, o. c., n° 513 ; LEITNER², *Lehrb.*, p. 274 s. ; *Dictionnaire de Théol.*, under *Disparité du culte*, col. 1427 s. ; *Le Régime des cultes*, p. 109 s.

1. See *Deut.*, VII ; *Exod.*, XXXIV, 16 ; *Esdras*, X, and the interpretation of BENEDICT XIV, *Singulari*, par. 3-6.

2. *I Cor.*, VII, and *II Cor.*, VI.

3. Thus St CYPRIAN, *De Lapsis*, c. 6, declares, « that to marry with infidels, is to prostitute the members of Christ ». *Ed. Hartel*, Vienna, 1868, I, p. 240.

4. See WERNZ, o. c., n° 504 ; SCHNITZER, o. c., p. 475.

5. See WERNZ, l. c. ; *Conférences de Paris*, o. c., III, p. 11 s. ; and the *Dictionnaire de Théol.*, under *Disparité de culte*, col. 1417-1420. These authorities assign to the change mentioned above, a date yet *earlier* than the twelfth century. On the other hand, SCHNITZER, o. c., p. 475, in accordance with FREISEN (o. c., p. 640), maintains that the origin of the *diriment* impediment does not go back further than the *end of the twelfth century*, and that Gratian (in his *Dictum* on C. XXVIII, qu. 1, cap. 14), had no knowledge of it. Benedict XIV himself says in his Constit. *Singulari* : « The canons collated by Gratian in C. XXVIII, qu. 1, forbid marriage between the faithful and infidels, but they do not annul it ».

Article 6. The Impediment of Consanguinity.

I. Meaning of terms used.

293. Definition of consanguinity;

1. Consanguinity or blood-relationship is the bond that unites two persons of the same blood, i. e., who come from the same stock, within fixed limits (1), or of whom one is the direct descendant of the other.

its different kinds.

Consanguinity is *divided* into :

a/ *Legitimate* and *illegitimate*, according as it is based on legitimate or illegitimate birth.

b/ *Perfect* (or complete) and *imperfect* (or incomplete), according as it is derived at the same time from the father and the mother, or from one of them alone. Thus there is not perfect consanguinity between sons of one and the same father but of different mothers, or inversely ; sons are called *uterine* brothers if they have only the same mother ; *half-brothers by the father's side* if they have only the same father, and *brothers-german* if they have a common father and mother.

c/ *Cognation* and *agnation*. Blood-relations on the father's side are often called *agnates*, and those on the mother's side *cognates* (2). In Flemish, they are sometimes respectively known by the names of *zweerdmagen* and *spillemagen*, that is to say, blood-relations on the side of him who wields the sword and of her who works the spinning-wheel.

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1. We say : *within fixed limits*, for the tie of blood has not an unlimited extension ; it is restricted to certain degrees, as laid down by public authority.

2. The Roman law gives these words a different signification. P. Willems, *Droit Romain*, p.69 s., says : « between children who, at the time of the death of the paterfamilias were still living under his patria potestas, and between them only, there exists the legal relationship known as *agnatio* ; blood-relations who are not agnati, are *cognati*.... The emancipated son, the daughter who is in the *manus* of her husband, are not *agnati*, but *cognati* of their brothers or sisters ». See Darenberg et Saglio, o. c., V° *Agnatio* (I¹, p. 146) et V° *Cognati* (I², p. 1282 s.) ; Howard, o. c., I, p. 11-12.

In like manner Ledru, o. c., p. 45, says : « At Rome they distinguished two kinds of relationship : *cognatio*, the bond that unites all those descended from a common ancestor ; *agnatio*, the bond that unites all those who are under the power of the same paterfamilias, or who would be so if the most remote head of the family were still living ». See Darenberg et Saglio, o.c., under *Agnatio*, (I¹, p. 146) and *Cognatio* (I², p. 1282 s.).

d/ *Simple* and *multiplex*, according as the persons related to one another trace their descent from a common ancestor by one line or by several. *Multiplex* consanguinity between two persons may result from a *threefold* cause : 1. from the fact that their ancestors contracted marriage within the degrees of consanguinity determined by law; or 2. from the fact that they are respectively descended from ancestors who, being related with one another, as for example two brothers, have married two women also related to one another, such as two sisters ; or 3. from the fact that they are of one and the same father and of two different mothers related with one another, or vice versa. See below, n° 296.

294. *The stock,*

2. The **stock** is he or she from whom the persons mutually related draw their origin, as branches that spring from the same trunk. Thus parents are the stock in relation to brothers and sisters ; grandparents in relation to first cousins.

the line,

3. The **line** is the series of persons united with one another by a bond of consanguinity. This line is *direct* when the persons are descended the one from the other ; thus father and son, grandfather and grandchild are related in the direct line. It is *collateral* (transverse, oblique), when the persons come from a common stock, as brother and sister, or cousins. This collateral line is *equal* or *unequal* (mixed), according as the persons related to one another are equally distant from the common stock, as brother and sister, first cousins ; or are unequally distant from it, as uncle and niece.

the degree.

4. The **degree** is the measure of the distance between persons related in the same line.

II. Ascertainment of consanguinity.

Relationship is ascertained by indicating the *line*, direct or collateral, equal or unequal, and the *degree* ; and by adding, in case of multiplex relationship, *how often* it occurs and in what degrees.

295. *Rules for counting the degrees of simple relationship ;*

A. For **counting the degrees**, the following are the *rules* laid down by canon law in the Latin Church.

1. In the *direct line*, two persons are removed by as many degrees as there are generations ; or, there are as many degrees as persons, not including the stock. Thus father and son are in the first degree in the direct line.

2. In the *equal collateral line*, there are as many degrees as generations between *one* of the persons and the common stock. Thus brothers are in the first degree in the equal collateral line, first cousins in the second degree.

3. In the *unequal collateral line*, two persons are removed from one another, by as many degrees, as the furthest removed of them is separated from the common stock. Thus, uncle and niece are in the second degree. However, for more closely determining the degree, it is customary to indicate the distance on either side ; and, as we shall see later, this is ordinarily required by the style of the Roman Curia. Thus, in the example given, one should state that the uncle and the niece are in the second degree mixed with the first (1) or joined with the first *(tangente 1^m)* (2).

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1. Observe that the expression « *mixed degree* », if it signifies unequal degree or degree of the unequal line, can also have other significations (cf. *Collat. Brug.*, t. V, p. 481 s.), and, notably, that it signifies *multiplex* relationship (or affinity), in opposition to simple relationship. We have an example of this latter acceptation in the text of the Quinquennial Faculties granted by the S. C. de P. F., Formula III, n° 3.

2. The following is the *nomenclature* of relations in the different lines and degrees, up to the fourth degree inclusively :

1. In the *direct* line, *first degree* : father and daughter, *pater et filia*; mother and son, *mater et filius ; second degree*: Grandfather and grand-daughter, *avus et neptis*; grandmother and grandson, *avia et nepos ; third degree* : great-grandfather and great-grand-daughter, *proavus et proneptis ;* great-grandmother and great-grandson, *proavia et pronepos ; fourth degree* : great-great-grandfather and great-great-grand-daughter, *abavus et abneptis ;* great-great-grandmother and great-great-grandson, *abavia et abnepos.*

2. In the *collateral* line : a/ *equal* line, *first degree* : brother and sister german, i. e., issue of the same father and of the same mother ; half-brother and half-sister, i. e., of the same father ; uterine brother and sister, i. e., of the same mother : they are called respectively own brothers, and half-brothers or brothers on the father's side and brothers on the mother's side ; *second degree* : cousins german, called in Latin *patrueles*, if they are children of two brothers ; *amitini*, if they are children of a brother and of a sister ; and *consobrini*, if they are children of two sisters ; *third degree* : second cousins, *sobrini propiores ; fourth degree* : cousins in the fourth degree.

b/ *Unequal* line : *first degree mixed with the second* : paternal uncle and aunt, *patruus et amita*, or maternal uncle and aunt, *avunculus et matertera*, in regard to their nephew and niece, *nepos, neptis ; first degree mixed with the third* : paternal and maternal great-uncle and great-aunt, *magnus patruus, avunculus, etc.*, with regard to their great-nephew or great-niece, *pronepos, proneptis ; first degree mixed*

These, we say, are the rules *laid down by the canon law in the Latin Church ;* for as regards the collateral line (1), the degrees are reckoned otherwise in the civil law and in the Greek Church. The civil law and the Eastern Church (2) have, in fact, adopted the method of reckoning of the Roman law (3), according to which the generations of *both* persons are counted, in such a way that they are considered as removed the one from the other by as many degrees as there are generations on the one side and the other. Thus, brothers are in the second degree, first cousins in the fourth, uncle and niece in the third, and so forth.

B. **To reckon the degrees of multiplex relationship :**

296. and for counting the degrees of multiplex relationship.

This is the rule : Relationship, e.g , between an engaged couple, is *multiplex as often as the ascending lines* of both of the said parties *meet,* within the degrees fixed by law, in *one and the same stock common to both of them* (4), even if such lines pass by persons who constitute an intermediate stock, provided that they do not *pass both at once by the same person* (5).

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with the fourth : great-great-uncle, etc., *propatruus, etc.*, with regard to their great-great-nephew or great-great-niece, *abnepos, abneptis ; second degree mixed with the third* : uncle and cousin once removed.

1. In the *direct* line, the manner of reckoning is the same in the Catholic Church of both rites and in the civil law.

2. See ZHISHMAN, o. c., p. 216 ss.

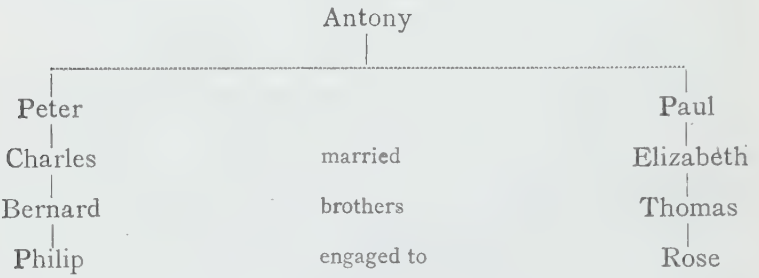
3. The canonical reckoning in the Latin rite follows the *Germanic* or *Teutonic* reckoning, which the Western Church adopted in the eighth or ninth century, as we shall see later, in n° 301.

4. Observe that husband and wife, *regarded as the stock*, are considered as being but *one person ;* thus, brothers german are not twice related in consequence of their being issue of the same father and of the same mother ; and in this respect, no distinction is made between perfect and imperfect consanguinity, between own brothers on the one hand, and halfbrothers on the father's side and uterine brothers on the other hand.

5. In reckoning multiplex relationship, *we must consider the nearest stock*, and so brothers are not in the 2nd, 3rd or 4th degree because, through their parents, they go back to a common grandfather, great-grandfather or great-great-grandfather. But this does not mean that, when the nearest stock is reached, one must never go back to a more distant stock, as was maintained by certain authors censured by the C. S. O., in the decree of 11 March 1896 and of 24 Feb. 1899 (in the *Collat. Brug.*, t. I, p. 376 and t. IV, p. 422 s.). For nothing prevents passing to a more distant stock *through two different persons constituting the same stock*, but the *two lines cannot both pass at once through the same person.* The sense and scope of this observation are apparent in the examples that we give.

It is easy to apply this rule in each of the *three hypotheses* corresponding to the three sources that give rise to multiplex relationship. Thus :

For the first hypothesis, let us suppose two engaged parties, first cousins to one another, who therefore have common grandparents,and let us suppose these latter also first cousins to one another, i. e., related in the second degree of the equal collateral line, according to the following genealogical tree :



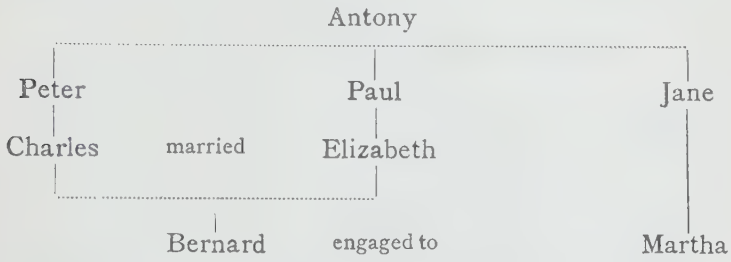
It is easy to see that the prospective partners, Philip and Rose, meet *the first time* in the common stock, Charles and Elizabeth, and that they are accordingly first related in the second degree of the equal collateral line ; and then that they are *twice* related in the fourth degree of the same line, since they meet by two different ways in the common stock,Antony,four generations removed; and observe that they do so,without the lines drawn from the respective parties (to Antony) passing *both at the same time* through the same person. A line can be drawn from Philip passing through Charles, while the line drawn from Rose passes through Elizabeth ; and a second line can be drawn from Philip passing through Elizabeth, while that drawn from Rose passes through Charles (1).

It cannot be here objected to the *distinct* passages through the grandfather on the one hand and the grandmother on the other,that husband and wife (Charles and Elizabeth) are to be considered as forming but one person ; for that does not hold good when they serve for passing to a more distant stock, but only *when they are*

1. This same case is explained and solved by the decree of the C. S. O., of the 11 March 1896 ; compare with that of 24 Feb. 1899, ad 1m, and the passages cited ; see on this subject the observations made in the *Collat. Brug.*, t. V, p. 230.

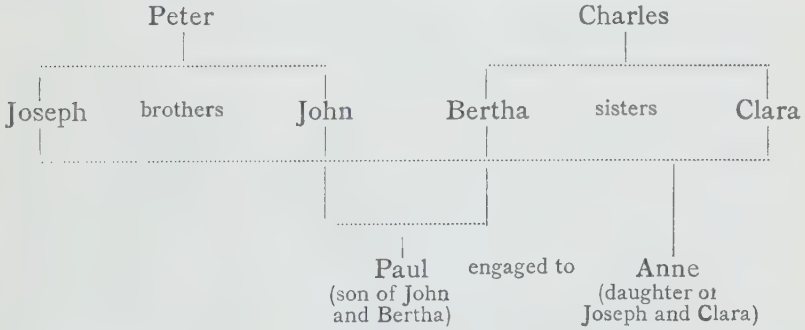
taken as the stock, as is the case when reckoning the second degree.

The following is yet another genealogical tree for this first hypothesis (1) :



Bernard and Martha are *twice* related in the third degree mixed with the second ; one goes back from Bernard to Antony on the one side by Charles and Peter, and on the other side by Elizabeth and Paul, while one goes back from Martha to the same Antony through Jane (2).

For the *second hypothesis,* we will take engaged parties whose respective fathers are brothers, and whose mothers are sisters, as shown in the following diagram :



From this it is at once apparent that Paul and Anne are *twice* related in the second degree of the equal collateral line (3).

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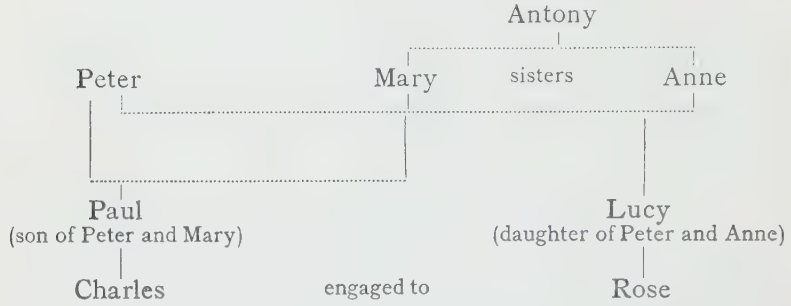
1. This diagram, like the preceding and the two following, is borrowed from the THEOL. MECHL., o. c., p. 267 s.

2. It does not matter that, in going back to Antony, one ascends twice from Martha through the same Jane. As far as the rule is concerned, it is enough that the lines do not pass *both together* through the same person.

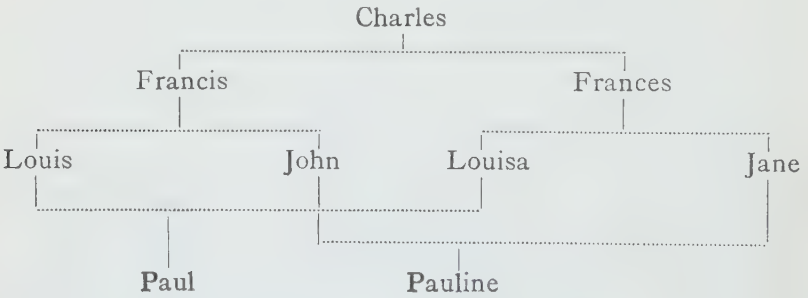
3. This case is also considered in the decree of 1899, l. c., ad 3m.

For the *third hypothesis,* we will suppose the case in which the engaged parties have a common grandfather and different grandmothers, who are sisters, and whom the common grandfather has successively married, as shown in the following diagram :



It is clear that the engaged parties are related in the second degree of the equal collateral line, as having Peter for their common grandfather ; and at the same time in the third degree of the same line, as having Antony for their common great-grandfather on the mother's side.

These hypotheses may also be *combined*, as in the following example, where the first is joined with the second :



We apply these principles, and find according to this table :

a/ That Paul and Pauline are *twice* related *in the second equal degree in the collateral line ;* since they are *once* connected with the same common grandfather, Francis : Paul through his father, Louis, and Pauline through her father, John ; they are connected also *once* with the common grandmother, Frances : Paul through his mother, Louisa, and Pauline through her mother, Jane.

b/ That they are *twice* related *in the third equal degree in the colla-*

teral line, because they are *twice* connected with the common stock, Charles, three generations removed, and that, by tracing the lines from each of the engaged parties through *different* persons, namely : *a*/ from Paul through his father, Louis, and his grandfather, Francis ; and from Pauline through her mother, Jane, and her grandmother, Frances ; *b*/ from Paul through his mother, Louisa, and his grandmother, Frances ; and from Pauline through her father, John, and her grandfather, Francis (1).

These engaged parties are, therefore, *four times* related : twice in the second equal degree, and twice in the third equal degree, of the collateral line (2).

297. *How to draw up a genealogical tree.*

Note. 1. To find out if the engaged parties are related to one another, draw up a *genealogical tree* for each of them, by writing down their ascendants as far as their great-great-grandfathers and great-great-grandmothers. If, in the two lists, each of which includes thirty persons, you meet with the same name, that is a sign that there exists a relationship between the engaged couple : you must then determine whether it is simple or multiplex, according to the rules given.

Points to be inserted in the supplica.

2. For the validity of the dispensation, it is neccessary to state, in accordance with the style of the Curia, the degree and the line, and, in case of multiplex relationship, to add how many times it exists and in what degrees. For the Instruction of the S. C. de P. F., of 9 May 1877, enumerates the points, of which « mention must be made in the letter asking for a dispensation, by the right, custom or style of the Roman Curia, so that if, even unwittingly, the truth is suppressed or falsehood alleged, the dispensation is

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1. This double relationship in the third degree accordingly results from the relationship which existed in the second degree between Louis and Louisa on the one part, and between John and Jane on the other part. This relationship was not suppressed by the dispensation that those parties obtained for their marriage ; for, as Feye says, *De Imp.*, n° 361, « a dispensation has not the effect of suppressing the relationship for the time to come, but of removing from between the dispensed parties that which the Church has set up, namely, the prohibition of marriage », that is to say, the existence of an *impediment* in relation to the marriage to be contracted.

2. See the *Collat Brug.*, t. V, p. 231 s., where we refute the opinion of those who hold that, in the example given, Paul and Pauline are related *four times* in the third degree. See also Planchard, *R. th. fr.*, 1896, p. 540 ss.

rendered null » ; now, under n° 5, in this document, it is specified that it is necessary to insert : « *the number of the impediments,* v. gr., if there is a double or multiplex relationship... ». *Collect.*, n° 1482 ; see below, n° 381.

Nevertheless, according to the decree of 24 Feb. 1899, cited in the *Collat. Brug.*, IV, p. 422, the dispensation is valid, even when the supplica gives by error an inexact number in connection with multiplex relationship, « provided that the case has been set forth as it really is, notwithstanding the material error in the reckoning of the impediments ». It is therefore sufficient if, e. g., the petitioners have furnished their complete genealogical tree (1).

III. Law in force.

There exists a dirimnent impediment, by the ecclesiastical law, between those related in the direct line, no matter in what degree, and in the collateral line, up to the fourth degree inclusively, according to the canonical way of reckoning them ; moreover, marriage is null, even in the natural law, in the first degree in the direct line, and probably in the entire direct line, as well as in the first equal degree of the transverse or collateral line.

Explanation.

A. Provisions of the Canon law.

298. In the ecclesiastical law, consanguinity invalidates marriage to the fourth degree in the collateral line,

1. *In the collateral line,* marriage is invalid, in the *Latin* Church (2), to the fourth degree inclusively, since the reduction, made by Innocent III, at the Fourth Council of Lateran (1215), can. 8, X, IV, 14 : « The prohibition of marriage *shall not henceforth go beyond the fourth degree* of consanguinity and affinity, seeing that such

1. See n° 381. In order to prevent errors, the *Pastorale Brugense*, 2nd ed., p. 189, wisely directs parish priests (at least in difficult cases), « to send to the Official, in asking for a dispensation in the matter of consanguinity and affinity, a *complete* genealogical tree, giving the names and Christian names of all the ascendants, in case the engaged parties should be bound, without knowing it, by the impediment of multiplex relationship ».

2. The *Greek* Church, which follows, as we have said, the old reckoning of the Roman Law, has also adopted and preserved the extension of the impediment to the 7th degree, formerly in force in the whole Church, both in the East and the West ; nevertheless, it does not everywhere consider this last degree as a diriment impediment. See Zhishman, o. c., p. 229 ss., and what we say below in n° 301.

prohibition can no longer be generally observed in the remoter degrees, without grave inconvenience » (1).

This limitation must be so understood, that the impediment, in the unequal collateral line, ceases as soon as the fourth degree on one side or the other is passed (2) ; hence the well-known saying : *gradus remotior trahit ad se proximiorem*, i. e., the more remote degree draws to itself the nearer.

It should be observed that the impediment of consanguinity exists in the same way and within the same limits in the case of illegitimate relationship as in that of legitimate relationship (3).

and to every degree in the direct line,

2. *In the direct line*, marriage is null *in every degree*, as Nicholas I clearly teaches in his letter to the Bulgarians (866) : « Between persons who stand in the relationship of parents and children, no marriage is possible, as between father and daughter, grandfather and granddaughter, mother and son, grandmother and grandson, *and so on to infinity* ». Nor can it be said that Innocent IV, l. c., restricted this prohibition to the fourth degree. The reduction introduced by him deals only with the collateral line, as is quite clear from the reason that he alleges, namely, the practical difficulties to be avoided. These difficulties do not occur in the direct line, in which marriage is hardly ever attempted.

for several reasons.

3. There are many *reasons for this law* of the Church (4). The institution of this impediment is, in fact, demanded : a/ by the respect due to blood-relations, to which the use of marriage is opposed (5);

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1. Innocent III adds a quaint reason for the fitness of the *fourth* degree, when he says : « The number four is very fitting for the prohibition of bodily union..., since there are in the body four kinds of humours, which in turn are composed of the four elements ».

2. Gregory IX, c. 9, X, IV, 14, says : « A man who is four degrees removed from the stock and a woman who is, on the other hand, five degrees removed, may lawfully marry, in accordance with the recognised rule : *quoto gradu remotior differt a stipite, et a quolibet per aliam lineam descendentium ex eodem* (one must keep to the degree the more distant from the stock, whatever be the degree of the other line in relation to the same stock) ». See Esmein, o. c., I, p. 352 s. This principle, according to Zhishman, o. c., p. 241, is not applicable to the Eastern Church.

3. As to the changes that may shortly be made in this rule, see below, nº 301, Scholion II.

4. See *Ons Geloof*, Brussels, January 1913, p. 15 ss.

5. This is the first reason given by St Thomas, 2a 2ae, qu. 154, art. 9 : « A man naturally owes a certain respect to his parents, and consequently to his other

b/ by the necessity that members of the same family are under of often seeing one another and of living together, whence they must be kept from marrying, lest « they should find too many occasions for sexual intercourse, and thus their characters be enervated by such indulgence » (1) ; c/ by the necessity of increasing the number of friends (2) ; d/ by the need of moderating the ardour of love, since, as Aristotle says, « seeing that a man has a natural affection for his kinswoman, if sexual love be added thereto, the result will be an excessive ardour of love and the utmost incitement of the passions » (3) ; finally, e/ by the danger that children born of such unions will be physically defective (4).

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blood-relations also, who derive their origin from the same near source ;... and it is evident... that carnal relations involve a certain indecency, which makes one ashamed of such actions ». See *Lev.*, XVIII, 6-18. Even without speaking of the use of marriage, there would be a want of due respect in marrying in the direct line, because such a union would destroy the necessary subordination between descendants and ascendants ; and this is still more evident in the case of marriage between mother and son, since the man is the head of the wife.

1. *Ibid.*

2. *Ibid.* ; St Thomas, appealing to the authority of St Augustine, says : « When a man takes to wife one who is outside of his own family, all his wife's blood-relations become bound to him by a special tie of friendship, as if they were his own ». Cf. cap. unic. C. XXXV, qu. 1.

3. *Ibid.*

4. We must admit that this danger has sometimes been exaggerated, especially by ancient writers. They alleged the existence of this danger in respect of marriages that were illicit for quite another reason than that of blood-relationship. Thus, we have cited above, in nº 134, passages deprecating sexual intercourse on a Sunday, under the pretext that « the children born of such intercourse would come into the world deformed, epileptic or leprous ».

On the other hand, it cannot be denied that marriages contracted outside of one's own kin are favourable to human selection, as may be inferred from the analogy of the animal world. It must also be admitted that bodily defects, which exist perhaps in a latent state in members of the same family, may manifest themselves in an aggravated form in children born of marriages between blood-relations. Doctors generally deprecate such unions, especially between near relations, and are supported by medical statistics, which must, however, be consulted with caution. Thus we find in Théphany, o. c., p. 11, the testimony of Dr Boudin, according to whom « the proportion of those who are deaf-mutes from birth grows with the degree of the consanguinity of the parents. If, in an ordinary marriage, the danger of bringing into being a deaf-mute be represented by 1, this danger is represented by 18 in marriages between first cousins, by 37 in mar-

B. **Provisions of the natural Law.**

299.

1. *As regards the direct line*, no one will deny that the natural law invalidates marriage *in the first degree*, that is to say between parents and children. Most certainly the reasons which we have just alleged are peculiarly applicable here, especially the first two. If such a union were tolerated, both the marriage itself and its use would be an outrage on the law of reverence and subordination that children owe to their parents, and the necessary dwelling together of parents and children would be rendered extremely dangerous. In this matter, a simple prohibition without the sanction of nullity would be ineffectual (1).

In the natural law, it invalidates marriage probably in every degree in the direct line,

Beyond the first degree, the question is a *disputed* one ; but it is probable that the natural law annuls indiscriminately any marriage whatever in the direct line, no matter in what degree (2).

2. Passing to the *collateral line*, the natural law certainly does not invalidate marriage in the second degree. This is the teaching of Innocent III, c. 8, IV, 19, who declares that marriages of unbap-

and probably in the first degree in the collateral line.

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riages between uncles and nieces, by 70 in marriages between nephews and aunts ». This proportion is far greater still in the medical statistics of America, quoted by the Bishop of Metz at the Prosynodal Reunion of 1908 (*Rev. eccl. de Metz*, 1908, p. 329 s.), where the Prelate strongly inveighs against marriages between relations, and endeavours to deter the faithful from them by reminding them of the disastrous consequences, than which nothing is better calculated to bring the evil home to them. The following are the statistics : « 48.8 o/o of sickly or deformed children in marriages between relations in the 3rd degree ; 65.2 o/o in marriages between first cousins ; 81.1 o/o in marriages between uncle and niece, or nephew and aunt ; 96 o/o, if the relationship is double ». See also *Die Ehe*, 8th Aufl., 1905, p. 79 ; Dr Lefebvre, *Rev. des questions scientifiques*, 1877 ; De Haerne, *Mariages Consanguins et Surdi-mutité*, Louvain, 1877, as well as the letter of the Cardinal Pro-Datary, 19 June 1895, in the *Collat. Brug.*, t. I, p. 30 s. — Treub, *Verspreide Opstellen*, p. 101 s. is of a contrary opinion, and claims that « marriages between *perfectly healthy* relations do not entail any evil consequences » ; likewise Dr *Otto Zacharias*, in his preface to Darwin's book, *Die Ehe zwischen Geschwister-Kindern und ihre Folgen* (translated by Dr Van de Velde), Leipzig, 1876.

1. To what extent there has been observed, among primitive and barbarous races, a natural repugnance to sexual union between blood-relations, together with evidence of the grounds of such repugnance, may be seen in Westermarck, o. c., c. XIV, XV and XVI. Compare Howard, o. c., I, p. 125-132 ; see also, *ibid.*, the cognate question of exogamy and endogamy.

2. See the arguments in Wernz, o. c., n° 410, note 58.

tized persons in the second degree are valid (1). In the *first degree*, however, it is more probable that the impediment of the natural law exists, i. e., between brother and sister (2).

300. How the unbaptized are bound by this impediment;

Corollary I. The *unbaptized* are not bound by the impediment of consanguinity *in the collateral line, beyond the first degree*, except *indirectly*, according to the principles enunciated above, in n° 222; but they are bound *directly* by the impediment *in the direct line*, certainly in the first degree, and also probably in every degree; moreover, according to the more probable opinion, they are bound by it in the first degree of the *collateral line*.

If, therefore, unbaptized persons, desirous of baptism, are already married, being related to one another *in the collateral line*, in the second, third or fourth degree, or even in the second degree mixed with the first, their marriage must be regarded as valid, provided that it be not null by the civil law, and that it be otherwise free from any substantial defect. Consequently, such married people could not separate after their conversion, unless the matrimonial bond had been broken in virtue of the Pauline privilege or by a Papal dispensation. If they are related to one another *in the first degree in the direct line*, it would be necessary to consider their union as certainly null, even in the absence of any civil law invalidating it. If, finally, they are related *in the first degree of the equal collateral line*, or *beyond the first degree in the direct line*, the marriage contracted under such circumstances would be *doubtful*, and consequently, in view of the doubt as to the existence of the former bond, they could not be admitted to a second marriage, without having recourse to the Holy See (3); in the meantime,

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1. See also the Council of Trent, Sess. XXIV, can. 3.

2. This question has little or no practical importance, and we pass it over accordingly. Those interested in it, may consult WERNZ, o. c., n° 411. It is sufficient for us to adduce a negative argument drawn from c. 8, X, IV, 19, where Innocent III, admitting the validity of the marriage of unbaptized persons from the second degree inclusively, seems thereby to deny it in the first degree. Note also that this natural law yields to the necessity of the propagation of the human species, i. e., that it did not, for example, bind the sons and daughters of our first parents; just as the law forbidding theft loses its binding force in a case of extreme necessity.

3. The Holy See could permit them to do this, for the advantage of the faith, by declaring the parties freed from their former bond, or by dissolving, as far as

however, on account of the scandal resulting from such cohabitation, they could not be permitted to live together (1).

and how far the Church dispenses from it.

Corollary II. The Church can *dispense*, and, in fact, does dispense in the collateral line beyond the first degree (2). In the first degree of the collateral line, and in every degree in the direct line, it never dispenses (3), not even in a doubt of fact, i. e., when there is a doubt if the prospective husband is the (natural) brother of the fiancée (4). We must therefore, in conformity with this practice of the Church, restrict the very extended faculties which, like the Indult of 1888, permit the granting of a dispensation from all the diriment impediments of the ecclesiastical law ; in like manner, the dispensation from disparity of worship, by which the Holy See also removes, in respect of the baptized party, all the other impediments from which the unbaptized party is exempt (see n° 291,

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necessary, the marriage contracted in infidelity and not consummated since the baptism of the two parties. See above, n° 196.

1. Without having previously consulted the Holy See, one cannot permit them to live together. This is not strictly on account of the doubt as to the validity of their marriage, but is rather due to the danger of grave scandal. See hereon the *Anal. eccles.*, 1903, p. 188 ss. ; the *N. R. th.*, t. XIV, p. 513 ss., t. XXXV, p. 523 ss.

3. The Holy See does not make any great difficulty about granting a dispensation from the second degree, and herein it shows itself much more lenient than the Council of Trent, Sess. XXIV. c. 5, *De Ref. Matr.*, which declared that « in the second degree no dispensation shall ever be given, except in the case of great princes and for the public good ». It is not even rare to obtain a dispensation from the second degree mixed with the first, and the faculties granted in 1888 extend to that. Nevertheless, the Holy See has complained of the excessive number of such dispensations granted by delegation in the letter of the Cardinal Pro-Datary (1895), already referred to, and makes it a matter of conscience for Bishops to see carefully that there is a real canonical cause ; moreover, it enjoins that « in the autograph petition there should be set forth, in each case, the reasons and circumstances for which they think that the favour ought to be granted ».

3. Thus the petition of Henry VIII, when he sought permission for the marriage of his illegitimate son with his legitimate daughter, was persistlenty refused. The examples alleged to the contrary do not appear to have any foundation of truth.

4. See the decree of the C. S. O., 6 Apr. 1906, in the *Collat. Brug.*, t. XII, p. 777 s. Also the *Causa Varmiensis*, of 14 June 1884, in the *A. S. S.*, t. XVII, p. 178 ss.

at the end), does not extend to the impediment of consanguinity in the direct line, nor to the first degree of the collateral line.

301. Penalties.

Scholion I. *Penalties.* Apparently, at the present time, there exists only the penalty enacted by the Council of Trent, Sess. XXIV, c. 5, *De Ref. Matr.*, namely, that « if any one shall have contracted marriage knowingly within the prohibited degrees, he shall be separated without hope of obtaining a dispensation », that is to say, under the existing discipline, he will obtain one only with considerable difficulty (1).

Scholion II. Historical development.

Historical development.

The *Mosaic Law*, *Lev.*, XVIII, 6, declares that « No man shall approach to her that is near of kin to him, to uncover her nakedness », and then (7-20) goes on to determine the degrees within which marriage is forbidden, notably between parents and children, grandfathers or grandmothers and their grandchildren, brothers and sisters, paternal or maternal aunts and their nephews (2).

In the ancient *Roman Law*, marriages were forbidden in the direct line indefinitely (3), and in the collateral line to the third degree inclusively, according to the Roman way of reckoning ; i. e., between brother and sister, between paternal or maternal uncle and niece, between paternal or maternal aunt and nephew (4). Later this prohibition was extended to first cousins, and afterwards removed (5).

In the *Canon Law*, from the sixth century, marriage was forbidden as far as the sixth degree of the Roman law, consequently even between the sons and daughters of first cousins, that is to say, between second cousins ;

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1. There formerly existed a prohibiting impediment, known as that *of incest* (see above, nº 242), i. e., a prohibition made against such as attempted marriage with their own kin, by which they were forbidden henceforth to marry any person whatever. There long remained traces of this prohibition in the canon law, namely, in the clause formerly inserted in the rescripts of dispensation *in contracto*, forbidding the persons in question to contract a fresh marriage, after the death of the partner, without having recourse to the Holy See. See also above, nº 139.

2. The passage in *Numbers* XXXVI, 7, 8, enjoining men and also women to marry in their own tribe and kindred, must apparently be understood of distant members of the familly, to the exclusion of those near of kin ; moreover, it concerns solely heiresses to paternal property. On this point, see the commentaries on Holy Scripture.

3. L. 53, D., *De Ritu Nupt.*, XXIII, 2.

4. See Esmein, o. c., I, p. 337 ; he adds that there was also an impediment « between great uncle and great niece, between great aunt and great nephew ». See the L. 17, D., *De Ritu Nupt.*, XXIII, 2.

5. L. 19, C., *De Nupt.*, V, 4.

but shortly after, we find in many texts the prohibition extended to the seventh degree. This is how the law seems to have developed : the general principle being that marriage between relations must be avoided (1), according to *Lev.*, XVIII, 6, the impediment of consanguinity automatically extended as far as the relationship. Now, in the Roman law, under which the Church then existed, kin or blood-relations were admitted to succession up to the sixth degree, and in part also up to the seventh degree. See ESMEIN, o. c., I, p. 339-341.

Later, in the eighth and ninth centuries, the Latin Church (2) adopted the *Germanic manner* of reckoning the degrees (3), i. e., on one side only ; and it has preserved this practice to the present day. After some vacillation, it prohibited marriage, according to the above-mentioned reckoning, to the seventh degree inclusively, either owing to the influence of the Roman law or through the integral adoption of the Germanic law on this point ; for the Germans admitted relationship and legal succession up to the seventh degree (4).

There nevertheless remained some uncertainty in the Canon Law. Some held the seventh degree as the extreme limit, others the sixth (5) ; but the

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1. The canon law had before determined *individually* those between whom marriage was prohibited. Subsequently, *the principle of prohibiting marriage between relations* was advanced, and thus, in the Synod of Worms (868), can. 32, the extension of a general prohibition was insisted on, « usque dum generatio recordatur, cognoscitur aut in memoria tenetur ». HÉFELÉ-DELARC, o. c., t. V, p. 590 ; cf. *(ibid.*, t. IV, p. 245) can. 9, of the *Synodus Romana*, held in 721.

2. The Greek Church, as we have said above, has kept the Roman way of reckoning (which was at first adopted by the universal canon law) ; it also limits the impediment to the seventh degree. See nº 298.

3. This is how the Germans proceeded in their way of reckoning the degrees : « As primitive man took, as the basis of his elementary calculations, the fingers, so the Germanic tribes, in reckoning relationship, took, as the basis of their calculations, the joints of the upper part of the human body. To each articulation corresponded a degree of relationship, and this is what they call the *Leges*, when reckoning by *genu* or *geniculum*. The head with the neck represented the common author ; the shoulders represented his issue, his children, brethren to one another, forming the first degree, because they represented the first generation ; they passed next to the elbows representing the next generation and the second degree, then to the wrists, then, successively to each of the joints of one of the fingers, other than the thumb. There relationship ended ». ESMEIN, o. c., I, p. 344 s. ; cf. also LEFEBVRE, o. c., p. 320. This method of reckoning is proposed by Alexander II (1063), c. 2, C. XXXV, 5, as having been admitted in former times.

4. *Lex Longobard.*, II, 14, 1 ; *Lex Visig.*, IV, 2, 11.

5. The cause of this uncertainty is, perhaps, to be sought in the Roman law itself, where there also existed a certain fluctuation in the determination and

seventh degree gained the day (1). By that very fact, the impediment of consanguinity was extended to the 13th and 14th degrees of the Roman law (2). It is a disputed point, whether this impediment existed in the different countries *as a diriment impediment*, especially as regards the seventh degree (3).

For the modifications introduced by the Fourth Council of Lateran, see above, n° 298 (4).

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extension of the law of succession. This excluded in part, and in part included the seventh degree. This would explain the divergences in the canonical extension of the impediment of consanguinity, not only for the period in which the Roman reckoning was in use, but also for that in which the Germanic reckoning had been adopted. Or, again, this uncertainty may have arisen from the fact that certain authors, as is clear from c. 2, C. XXXV, qu. 5, § 9, began to reckon the genealogy from the first cousins, taking brothers as one and the same stock with their parents. See also can. 11 of the Synod of Selingenstadt (1022), in the *Concilia Germaniae*, III, p. 56.

1. See c. 17, C. XXXV, qu. 2; and c. 2, C. XXXV, qu. 5, § 4, where Alexander II (1063), appealing to the ancient custom of the universal Church during several centuries, adds : « Therefore, brothers who are in the second degree according to the civil law, are in the first degree, according to the canon law; the sons of brothers, who in the former case are in the fourth degree, are here reckoned in the second... And in like manner for the rest, it must be known that persons who, according to the canons, are in the sixth or seventh degree, are considered by the laws as being in the 12th or 14th. Relationship does not cease at this 6th degree, but at the 7th according to the canons ». See also the decree of Gelasius II (1101-1103), the text and interpretation of which are given by Sägmüller, *Theol. Quartalschr.*, 1913, p. 56 ss.

Among others, Burchard Wormaciensis endeavoured to extend the impediment to the seventh degree. Thus *in Decreto*, l. VII, c. 9, in the text taken from the letter of Rabanus Maurus, he changed « *sextam* generationem » into « septimam » ; c. 10, where he refers to c. 29, *Poenitentialis Marteniani* (Wasserschleben, o. c., p. 288 s.), in which consanguinity is extended to the sixth degree, he tampers with the text which sets forth the manner of reckoning the degrees, in so far as, differing from the *Penitential*, he puts the brother and sister as the stock itself, according to what we have said in the foregoing note. Migne, P. L., t. CXL, col. 787, and compare Fournier, *Etudes Critiques sur le Décret de Burchard de Worms*, Paris, 1910, p. 138 s. and 54.

2. See Gasparri, o. c., I, n° 677, who endeavours to prove that this extension of the impediment was adapted to the circumstances of the times.

3. Burchardus, *Decretum*, l. VII, c. 11 (Migne, l. c.) insists on the invalidating force up to the seventh degree, adding to the original text prohibiting marriage *infra septimam generationem*, the words : « *quod si fecerint, separentur* ». Cf. Fournier, l. c., p. 139.

4. As to the efforts made and the wishes expressed both at the Council o

Scholion III. Civil legislation.

Art. 161 : « En ligne *directe* le mariage est prohibé entre tous les ascendants et descendants légitimes ou naturels (1) » ; art. 162 : « En ligne *collatérale* le mariage est prohibé entre le frère et la sœur légitimes ou naturels» ; art. 163 : « Le mariage est encore prohibé entre l'oncle et la nièce, la tante et le neveu ». This last provision is applicable only to *legitimate* relations, but an imperial decision of 7 May 1808, followed in legal practice, has extended it to marriage « between great-uncle and great-niece », and, by analogy, « between great-aunt and great nephew » (2). We see, therefore, that the provisions of the Code Napoléon are in full accord with the primitive Roman law (3). *Civil law.*

Trent and at that of the Vatican for the restriction of the extent of this impediment, see ESMEIN, o. c., II, p. 258 ss. ; VILLIEN, *Les Réformes du droit canonique et les postulata du Concile du Vatican* (*Canon. Contemp.*, 1906, p. 67 ss. and 209 ss.) ; *Collect. Lacen.*, VII, 784, 842, 873 and 880 s. Observe that the C. S. O., notwithstanding the petition presented for that purpose, refused to abrogate, for the Indian missions, the third and fourth degrees of consanguinity and affinity. See the decree of 14 Dec. 1865, the *Collectan.*, n° 1241. On the opportuneness of the introduction of modifications, see the *Archiv f. k. Kirchenr.*, 1910, p. 323 ss. where, *inter alia*, is adduced the large number of marriages contracted in the third and fourth degree, by dispensation, or even without a dispensation having been sought, owing to ignorance of the impediment. The editor of this Review, which had for director Dr Heiner, Auditor of the S. Rota, himself observes, p. 327, that shortly the fourth degree in the collateral line will certainly be abrogated, and, perhaps, also the third.

As to the vicissitudes of Church legislation and the different extensions and restrictions of the matrimonial impediment, see *Ons Geloof*, Brussels, January, 1913, p. 15 ss.

1. It would appear that the natural relationship must be *legally recognised*. Cf. PLANIOL, o. c., n° 727 ; THIRY, o. c., I, n° 242. See, however, above, n° 149, where we have observed that, according to the new article 340c, as concerns matrimonial impediments, the child, whom its presumed father is bound by a judicial decision to support, is to be regarded in the same light as one legally recognised.

2. See PLANIOL, o. c., n° 726, under 3 ; ALLEGRE, o. c., I, p. 77 and 91 ; THIRY, o. c., n° 247 ; cf. also above, n° 243, where we speak besides of the dispensations to be obtained.

3. It is interesting to note the provisions of the law of Hammurabi (B.C. 2000), par. 154 : « Si un homme a eu commerce avec sa fille, on chassera cet homme du lieu » ; par. 157 : « Si un homme a dormi, après son père, dans le sein de sa mère, on les brûlera tous deux ».

Article 7. The Impediment of Affinity.

I. Meaning.

302. Definition of affinity;

1. By **Affinity** (1), in existing canonical discipline, is understood the relationship that one contracts with the blood-relations (legitimate or illegitimate) of the person with whom sexual intercourse has been had.

its foundation;

The *foundation* of affinity is,therefore, the *copula*, and not marriage, in opposition to the Roman law, to the civil law of France and Belgium, and also to the former canon law (2) ; this is why this impediment does not result from a non-consummated marriage, but, on the other hand, is contracted by illicit intercourse (3).

That *carnal relations* may entail affinity, they must be *of themselves fitted for generation,* according to what we have said in n° 125. There is no need, therefore, to take into account here acts of sodomy or of onanism (4), or those committed by one who is physiologically impuberal, or, finally of such as consist in applicatione virgae ad exteriorem partem vulvae, cum emissione spermatis ad orificium, sine penetratione. On the other hand, it would be sufficient that there should be relations procuring artificial fecundation, *in the wide sense of the word,* according to the notion that we have given of it in n° 280 (5),or, again, carnal relations with a wo-

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1. See the etymology of this word in Caron, o. c., p. 32 s. Consult also Gillmann, *Zur Geschichte des Gebrauchs der Ausdrücke « irregularis » und « irregularitas »*, Mainz, 1911. This author observes, on p. 7 ss , that, in the Middle Ages, legitimate affinity was also called « regularitas personarum ex nuptiis proveniens omni carens parentela ».

2. We explain below, in a scholion, the meaning of affinity as it formerly existed.

3. It is evident also that there can be no affinity between two persons, if neither of them has established sexual relations.

4. By onanistic intercourse is here meant that which is had with withdrawal, and is termed onanistic in the strict sense ; likewise intercourse had when the condom is used ; and also, it would seem, intercourse had with the employment, on the part of the woman, of the pessarium occlusivum, hermetically sealing the passage from the vagina to the uterus ; for such intercourse is not of itself fitted for generation. On the other hand, what we have said in the text is not applicable to intercourse followed by the expulsion or destruction of the semen received.

5 On the manner of proving such relations, especially when illicit, see the

man who has undergone the total excision of the internal organs of generation, or sexual intercourse effected by an old man whose sperm has become infecund.

In case, then, of relations fitted of themselves for generation, affinity arises between *each of the persons* taking part in the act, and the *blood-relations of the other*, but not, under the existing discipline (1), between each of them and the relations by marriage of the other (2), nor between the blood-relations of the one and those of the other (3).

Affinity *is divided :* *its varieties :*

a/ Into *legitimate* (licit) and *illegitimate* (illicit), according as it results from the marriage act or from unlawful intercourse, in accordance with what we shall have to say in n° 305.

b/ Into *antecedent* and *consequent* (supervening), according as it precedes the marriage or follows it, i. e., occurs during the marriage, as when one of the parties has intercourse with a blood-relation of the other.

c/ Into *simple* and *multiplex*. Multiplex affinity may arise from four different causes : 1/ from the fact that one of the married parties has misconducted himself with a person several times related to the other ; 2/ from the fact that the two parties have severally

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Votum canonistae, in the *Causa Imolen.*, 28 July 1906 (*Anal. eccl.*, 1906, p. 330) ; cf. also the *Causa Leodien.*, 26 Aug. 1905, in the *Collat. Brug.*, t. XI, p. 49 s. When the fact of the relations is certain, they are presumed to be perfect or complete, in the external forum.

1. See below, in scholion, the discipline formerly in force.

2. Thus a widower, under the existing discipline, is not related to the widow of his deceased wife's brother, or to the widow of his deceased wife's son, etc. Formerly, as we shall point out, there existed between such persons an affinity of a second kind.

At the present time one can here apply the legal saying : *Affinitas non parit affinitatem*, though the original signification of this saying was quite different, as Freisen remarks o. c., p. 489, namely, that affinity is not contracted by generation, but by intercourse. See below, n° 307.

3. Thus the husband is related by marriage to the blood-relations of his wife, and the wife to those of her husband, but the blood-relations of the husband are not related by marriage to those of the wife, nor vice versa. Therefore, two brothers can marry two sisters, and so on. See c. 5, X, IV, 14, where this is clearly explained by Innocent III.

had intercourse with a blood-relation of the other (1); 3/ from the fact that one of the parties has had intercourse with more than one blood-relation of the other; and 4/ from the fact that one party has had successively licit and illicit intercourse with the same blood-relation of the other party (2).

Many causes of multiplex affinity may, moreover, present themselves at the same time; but, for the validity of the dispensation, it is unnecessary to mention in the petition the multiplicity resulting from the fourth cause; it is sufficient, in this case, to mention the *licit* relations (3).

For the definition of *stock* and *degree*, see above, n° 294.

II. Determining affinity.

303. Rules for reckoning the degrees,

Affinity is determined in the same way as consanguinity, namely, by indicating the line and the degree, and adding whether it is simple or multiplex, and, if the latter, how many times and in what degrees.

Therefore, *for reckoning the degrees and indicating the line*, it is enough to apply the rules laid down above in the case of consanguinity, keeping in mind this principle, that « a person related to another in such a degree and in such a line, becomes affined in the same degree and in the same line to the one with whom the latter has had carnal intercourse » (4).

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1. For example, if the man has misconducted himself with the sister of his fiancée, and she with the brother of the man.

2. Such would be the case of a man who, being the widower of the sister of his present fiancée, had had intercourse with his first wife before marriage.

3. See the reply of the S. Poenitent., of 20 March 1842, to the Bishop of Namur, in the *Collectan.*, n° 1236.

4. Theol. Mechl., o. c., n° 79, qu. 3, where an example is given : « The grandfather of John, who is his blood-relation in the second degree in the direct line, is also the affinis, in the second degree in the direct line, of Catherine, with whom John has had intercourse. The brother of John, who is his blood-relation in the first degree in the collateral line, is also the affinis of Catherine in the first degree in the collateral line, and so forth ».

Note that one may be the affinis of another in *three* ways in the *direct* line, and in *two* ways in the collateral line. For, a man may be the affinis of a woman in the *direct* line, on account of relations had by himself, and thus he is affined in the first degree to his wife's daughter and mother ; or on account of relations had by his parents, and in this way he is affined in the first degree to his father's wife (his stepmother); or, again, on account of intercourse had by

To determine *multiplex* affinity resulting from the first cause, we must again apply the rule given for multiplex consanguinity (1). *and for determining multiplex affinity.*

To draw up the genealogical tree (2), and to furnish the particulars required for the validity of the dispensation, refer to what has been said at the end of n° 297, saving the restriction that we have just made concerning the fourth cause of multiplex affinity.

Finally, it is well to observe that sometimes affinity is co-existent with consanguinity, notably when one of a married couple, after the death of the other party, who was at the same time a blood-relation, wishes to marry the sister or brother of the deceased.

III. Law in force.

The impediment of affinity is only of ecclesiastical law. It invalidates marriage : 1° between legitimate affines in the direct line, probably in every degree, and in the collateral line, up to the fourth degree inclusively ; 2° between illegitimate affines up to the second degree of the collateral line, and in the direct line, probably in every degree.

Explanation.

304. Legitimate affinity invalidates marriage to the fourth degree in the

1. *Legitimate affinity* extends, *in the collateral line,* to the fourth degree ; this follows from what we have said above, in n° 298, A, 1. ; for the Lateran decree, c. 8, X, IV, 14, which we have cited

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his son or his daughter, in consequence of which, he is affined to his son's wife in the first degree. In the *collateral* line, by reason of relations had by himself, he is the affinis of his wife's sister, and through intercourse had by his brother, he is affined to his brother's wife ; in both cases, in the first degree.

1. The following is a list of affines in the first degree, in legitimate relationship 1° *In the direct line :* a/ stepfather *(vitricus)* and stepmother *(noverca)*, in relation to stepdaughter *(privigna)* and stepson *(privignus)* born of a former marriage ; b/ father-in-law *(socer)* and mother-in-law *(socrus)*, in relation to son-in-law *(gener)* and daughter-in-law *(nurus)*.

2° *In the collateral line :* a/ brother-in-law (husband's or wife's brother, *levir*) ; and sister-in-law (husband's or wife's sister, *glos*) ; b/ brother-in-law (sister's husband, *sororius*) and sister-in-law (brother's wife, *fratria*).

2. For the table of affinity, draw up a table of consanguinity between the person carnally known by one of the engaged couple and the other ; then, the party who has had such sexual relations will be considered as being in the same position as the person with whom they have been had, so that the former party is in affinity with the prospective spouse in the same line and in the same degree as the latter is related to the person with whom intercourse has been had.

collateral line ; and in the direct line probably in every degree ;

there, affects affinity as well as consanguinity ; while the reduction to the second degree, made by the Council of Trent, concerns only illegitimate affinity, as we shall presently show.

In the direct line, at least according to the more probable opinion, the impediment of affinity invalidates marriage indefinitely ; for before the Council of Lateran, affinity seems to have had the same extension as the impediment of consanguinity, and the restriction made by Innocent III, considering the object that he expressly had in view, affects only consanguinity and affinity in the collateral line. Cf. l. c.

illegitimate affinity to the second degree in the collateral line, and in the direct line as above ;

2. *Illegitimate affinity,* in the collateral line, extends only to the second degree, as provided by the Council of Trent, Sess. XXIV, c. 4, *De Reform. Matr.*, where the Council « restricts the impediment, consequent on *affinity contracted by fornication* and invalidating subsequent marriage, *to those only who are related in the first and second degrees.* In the remoter degrees, it enacts that affinity of this kind does not invalidate marriage henceforth contracted ». This is to be understood in the sense that, beyond the second degree, there is no longer even an *impedient* impediment (1).

In the direct line, this impediment more probably invalidates marriage in every degree, just the same as legitimate affinity. The restriction made seems to concern only the collateral line, since the object of the law, which is the same as that sought by the Council of Lateran, is practically applicable to the collateral line alone (2).

The extension of the impediment of legitimate affinity to the fourth degree, and of that of illegitimate affinity to the second degree, must be understood, according to the rule given above, in the sense that the remoter degree draws the nearer to itself and imparts to it its own prerogatives.

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1. See the declaration of Pius V, *Ad Romanum,* of 28 Nov. 1566. The first text submitted to the Fathers of the Council read : « in the remoter degrees, unless the fornication be public, affinity so contracted does not invalidate marriage, but only prohibits the contracting of it ». THEINER, o. c., II, p. 337.

2. A comparison of c. 4 with c. 3 of this 24th Session, shows that on this occasion also the principal reason of the reduction made consists in the inconveniences arising from a more extended prohibition. In addition to this, the controversy as to the extension of affinity in the direct line beyond the second degree has hardly any practical importance.

3. We say that this impediment is *of the ecclesiastical law alone.* *by ecclesiastical law alone.*

The texts brought forward abundantly prove that the impediment of affinity was established within fixed limits *by a constitution of the Church.* Now the Church instituted it for *reasons the same* as those set forth in favour of the impediment of consanguinity ; in due proportion, and apart from the danger of having children physically tainted, the same reasons support both ecclesiastical laws.

But, on this point, we must go still further and say that, *in no degree and in no line,* is the impediment of affinity *derived from the natural law.*

There could certainly be no doubt of this except in the case of the *direct* line, and even there with regard to *legitimate* affinity only, since the Church commonly dispenses from both kinds of affinity in the collateral line, as well as from illegitimate affinity in the direct line (1). But, as concerns marriage between *legitimate* affines in the *direct* line, it will be admitted that it is valid in the natural law, beyond the first degree, and there are examples, of dispensations granted in such cases ; but, beyond this, the same thesis can be maintained in the case of the first degree, with most weighty arguments, drawn especially from the decrees of the C. S. O., of 4 Sept. 1743 (2) and of 26 Aug. 1891 (3), as well as from the text of the Indult of 20 Feb. 1888, which grants the power of dispensing from all diriment impediments *of the ecclesiastical law,* except legitimate affinity in the direct line ; all doubt has now been removed by a recent dispensation, of which we shall speak

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1. Formerly these dispensations were very rarely, if ever, granted ; and some authors maintained that affinity, even in the *collateral* line, invalidated marriage in the natural law, and that, accordingly, no dispensation was possible. This was the pretext advanced by Henry VIII, of England, for the annulment of his marriage with Catherine, the widow of his brother, as explained at length by Caron, o. c., p. 152-160. Cf. *Archiv f. k. Kirchenr.,* 1910, p. 418 s. ; Watkins, o. c., p. 707 ; Luckock, o. c., p. 319 ss. ; and above, n° 197.

2. « It cannot be doubted that the Sovereign Pontiff has the power to grant a dispensation from affinity, even legitimate, in the first degree, between stepfather and stepdaughter ». This answer is in accord with the consultation of Cardinal De Lugo, 1797, quoted by Gasparri, o. c., I, n° 697.

3. *Collectan.,* n° 1247 : « Affinity that is contracted naturally in a state of infidelity by lawful or unlawful intercourse between the sexes, is not an impediment to marriage between unbaptized persons ».

in n° 306. See also BENEDICT XIV, *De Synod. Dioec.*, l. IX, c. IX, C. XIII, n° 4 ; GENNARI-BOUDINHON, *Consultations-morale*, Consult. 118; and the documents quoted in the *Collat. Brug.*, t.V, p.235 s.(1).

305. It is a question whether conjugal relations in an invalid marriage involve legitimate affinity.

4. We have now to determine with care what is meant, in the Decree of the Council of Trent, by the words *affinity by fornication* or *illegitimate affinity*, as it is commonly called ; for on that depends the question whether the impediment, in a concrete case, extends to the fourth degree or stops at the second.

a/ In the first place, it does not matter whether the fornication, from which the affinity arises, be simple or qualified, i. e., complicated with aggravating circumstances, such as adultery, incest or sacrilege.

b/ We have, further, to consider two points : 1. that the decree of the Council of Trent is a derogation from the law, that must, therefore, be interpreted strictly ; 2. that the object of this provision was to avoid the practical inconveniences that easily arise from the occult nature of illicit relations. This object is more clearly indicated in the text of the original decree that was first laid before the Fathers of the Council, in which affinity resulting from *public* fornication was excepted from the benefit of the proposed restriction. According to the said text, the impediment arising under such circumstances retained its invalidating power to the fourth degree (2).

In the light of these preliminary observations, we are of opinion that the following statements may be established.

We must here regard as fornication only that intercourse which takes place *outside of all marriage*, or in marriage that is *invalid and without any appearance of marriage*. We must, therefore, make an exception here of sexual relations occurring in a marriage that has been invalidly contracted, but that, nevertheless, *retains the outward appearance of marriage*, however sinful such relations may be in conscience (3).

And in truth, by the very fact that these relations take place in

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1. Consequently, the unbaptized are not affected *directly* by this ecclesiastical impediment, but only *indirectly*, according to what has been said above in n° 222.

2. See THEINER, o. c., II, p. 337.

3. It is accordingly clear that the words : *legitimate* and *illegitimate* affinity, resulting from *licit* or *illicit* intercourse, are not to be taken literally, i. e., according to what is legitimate in conscience.

marriage, even though it be invalid, one cannot say that they constitute fornication in the strict sense of the word ; and if such union retains at the same time the outward appearance of marriage, the special end proposed by the Council of Trent is no longer applicable to it ; in other words, there is not then reason to fear the inconveniences arising from the occult nature of fornication (1).

It follows from this, that legitimate affinity, invalidating marriage to the fourth degree inclusively, is contracted by sexual intercourse between persons united in the bonds of an invalid marriage, as often as such union preserves the appearance of marriage, according to what we have said above in n° 92.

This opinion is certain in the case of marriage contracted *in good faith on both sides* (2) ; and the majority of authors extend it to cases in which good faith exists *only on one side* (3) ; moreover, having regard to the principle of strict interpretation, it is probable also when the marriage has been celebrated *in bad faith* by both the parties.

On the other hand, *legitimate* affinity is not contracted by a mere *civil marriage ;* for the Church, to mark its detestation of such an abuse, refuses to recognise in it any appearance of marriage, when it takes place between those who are subject to the

1. This is why we think this outward appearance of marriage necessary in order that the intercourse may be considered as involving legitimate affinity. On the other hand, Van de Burgt-Schaepman, o. c., n° 187, strongly maintains that intercourse cannot be regarded as fornication, and that consequently it involves affinity to the fourth degree, whenever it takes place after matrimonial consent *valid in the natural law*, even when the outward appearance of marriage is wanting. We cannot fall in with his view. Having regard to the object proposed by the Council of Trent, and to the standpoint that we have taken up, the legitimacy of the relations and of the affinity depends more on the outward appearance of marriage or the absence of the same, than on a defect which might invalidate the marriage on account of faulty consent.

2. The S. C. C., in the *Causa Briscien.*, 3 Dec. 1667, authoritatively settled this question. Asked in connection with the proposed marriage of a man (whose first marriage had been declared null) with a woman related to his first wife in the third degree, it answered that the marriage in question could not take place, owing to the twofold impediment of public decency and of *affinity*. Gasparri, o. c., I, n° 698.

3. These cases fall within the purview of the answer of the S. C. C., 15 Apr. 1752, in Gasparri, o. c., I, n° 698.

law of clandestinity. The intercourse of such a couple must be regarded as illegitimate in relation to affinity, and as actual fornication (1).

Note. In view of this controversy, it may be asked if, in the case of an invalid union without any outward appearance of marriage, the affinity arising therefrom extends to the fourth degree, like legitimate affinity (as Van de Burgt-Schaepman maintains), or if it invalidates marriage only to the second degree, as we have just explained it. The doubt thus formulated would be a doubt of law, of ecclesiastical law, and consequently, strictly speaking, in accordance with what has been said in nº 240, the marriage could be proceeded with, without a preliminary dispensation, in case of affinity beyond the second degree ; for the Church then supplies as far as necessary. Nevertheless, one could not do so without referring the matter to the Bishop, as we have observed in the same place, unless there be danger in delay.

306. The Church can dispense in all cases of affinity.

Corollary. It also follows from what has been said, that the Church *can* dispense from the impediment of affinity, legitimate and illegitimate, *in every line and in every degree. As a matter of fact,* however, *it does not generally dispense from legitimate affinity in the direct line.* Even down to the most recent times, this was an *absolute rule as regards the first degree* (2), either on account of the controversy raised by certain authors as to the actual power of the Church, or on account of the impropriety inseparable from such marriages, e. g., between a man and the daughter or mother of his deceased wife, or the widow of his father or of a deceased son. Exceptionally, a dispensation was granted in the direct line, in the case of legitimate affinity *beyond the first degree,* not to con-

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1. See above, nos 92 and 233, and the decrees there cited, where civil marriage is spoken of as concubinage. In confirmation of this, we may add that civil marriage has not the effect of inducing the impediment of public decency, as we shall point out later, in nº 311.

2. Cf. Bened. XIV, *De Syn. dioec.*, l. IX, c. 13, nº 4 ; *Instr.* C. S. O., 9 Dec. 1874 and *decr.* C. S. O., 20 Feb. 1888 *(Collectanea,* nº 1242 and 1472) ; *solutiones* S. C. de P. F., in *Causa Leodien.*, 28 May 1796 *(Thesaurus resol. S. C. C.*, t.LXV, p. 111 ss.) and in *Causa Malacitana* 16 June 1894 (A. S. S., t. XXVII, p. 242 ss.) ; cf. also the fact related in the A. S. S., II, p. 127 s. See also the *Collat. Brug.*, t. XII, p. 121 ; Gennari-Boudinhon, o. c., *Consultations-Morale,* cons. C. XVIII ; Leitner[2], *Lehrb.*, p. 223.

tract a marriage, but to revalidate a marriage already contracted, provided that it was celebrated in good faith and that the affinity was occult in fact (1). Cf. WERNZ, o. c., IV, n. 438.

Quite recently, however, we have seen the Church's discipline relaxed with regard to dispensation from lawful affinity in the first degree of the direct line. Thus, on the 2nd Dec. 1911, a Rescript of Dispensation was granted by the S. Poenitentiaria to petitioners who had approached it, after their application had been rejected by the S. C. de Sacr. (the text of which rescript is given in the *N. R. th.*, 1912, p. 528 ss., cf. also *Collat. Brug.*, 1912, p. 674 ss.), for the purpose of revalidating a marriage civilly contracted between a widower and the *illegitimate* daughter of his deceased wife. In the same place, mention is made of a like dispensation granted eight years before by the Sovereign Pontiff, by word of mouth. Whence it is evident that the discipline of the Church in this matter has been considerably modified. It would seem, however, that it must be admitted that such a dispensation would always be extraordinary, and that recourse could be had to it only in desperate circumstances.

As regards affinity, licit or illicit, *in the collateral line*, the Church does not at the present time show any great difficulty in removing the impediment, even in the first degree, notwithstanding the stricter discipline formerly introduced by the Council of Trent, Sess. XXIV, c. 5, *De Reform. Matr.*

Finally, in the matter of *illegitimate affinity in the direct line*, Rome is accustomed to grant a dispensation when the impediment is *occult* in fact, as is shown by the Indults granted to Ordinaries ; and even, but with greater difficulty, when the impediment is *public* (2). Nevertheless a condition is attached to the dispensation or Indult, that « *the (contingent) intercourse with the mother of the woman did not precede the birth of the latter* », so as to avoid the risk of a man marrying his own natural daughter. This risk is sufficiently removed, however, if the intercourse with the

1. We must therefore interpret the powers of granting a dispensation in this sense, that licit affinity in the direct line is always excepted, even when no mention is made of the exception (the Indult of 20 Feb. 1888 specifies the restriction); in like manner we must restrict the principle of which we have spoken in n° 291.

2. See GASPARRI, o. c., I, n° 703, together with the Indult of 1888.

mother took place so long, or so shortly, before the birth of the intended wife, that it is physically certain that this latter is not the offspring of that intercourse (1).

Note. We have spoken above, in nos 138 and 139, of affinity *supervening on marriage*, and of its effects both on the marriage itself and on the use of it.

Scholion I. Historical evolution.

307. Ancient discipline.

In the *Law of Moses*, marriage was prohibited between affines in the first and second degrees of the direct line, and in the first degree of the collateral line (saving the exception made for the law of the levirate) (2), as well as in the first degree mixed with the second, at least between a man and the widow of his father's brother. *Lev.*, XVIII, 8-18, and XX, 20 s.

In the *Roman Law*, marriage was forbidden, on the ground of affinity, only in the direct line between stepfather or stepmother and stepdaughter or stepson (born of a previous marriage), or between father-in-law or mother-in-law and daughter-in-law or son-in-law; but this affinity did not come from sexual intercourse, but from true marriage *(justae nuptiae)*, and so arose from a merely ratified marriage, but not at all from extra-matrimonial relations, not even from cohabitation (*contubernium*) or from Roman concubinage (*concubinatus*) (3).

In the Canon Law:

At first only the prohibitions of the Mosaic law were in force; but by

1. Thus in the faculties of the Vicariate of Nankin, in art. 6, this condition is expressed in these terms: « dummodo nullum subsit dubium quod conjux possit esse proles ab altero contrahentium genita ». Cf. *Monita*, no 204. Also in the faculties of the Vicariate of Congo (*De Religiosis-Periodica*, VII, p. 53).

2. Concerning the *law of the levirate*, and its relation, in the Mosaic Code, to the prohibition of marriage between those related by marriage, see Watkins, o. c., p. 54-62; Luckock, o. c., p. 272 ss.

3. Moreover, in the Roman Law, affinity could no longer arise after the dissolution of the marriage, so that the children born, or at least those conceived, after the dissolution of a union involving affinity did not contract it; e. g., the husband did not contract affinity with the daughter of his wife's sister, born after the death of his wife. It is even probable that affinity ceased to exist at the same time as the marriage from which it arose; and this was also the case in the French law before the Revolution, according to the saying: *morte ma fille, mort mon gendre*. See Caron, o. c., p. 44, 55 ss., 214. In the like sense, the French Chamber of Deputies (29 May 1907) adopted the following modification of article 162: « Toutefois l'alliance ne constitue plus un empêchement au mariage lorsqu'elle *a pris fin* par le décès du conjoint qui produisait l'alliance ». Castan, o. c., p. 128. The Belgian civil law deals with the matter otherwise. Cf. Thiry, o. c., no 244.

degrees these were widened, and from the eighth century, owing to the change introduced into the notion of affinity, its diriment power was soon extended as far as that of consanguinity. This was natural, when once the conception of affinity ceased to be that of the Roman law, the result of marriage itself, and when it came to be looked upon as the consequence of *sexual intercourse*, which united in one flesh the two persons concerned therein. Logically, the blood-relations of the one were regarded as being, in some sort, the blood-relations of the other, and all sexual intercourse, whether licit or illicit, as producing this effect. It was thus that, in the Middle Ages, even illicit affinity was extended to the seventh degree,saving the restriction made above as to its invalidating force in the remoter degrees (1).

But besides *this first kind of affinity*, to which sexual intercourse gave rise between each of the parties and the blood-relations of the other, canon law, still taking its stand on the carnal union, proclaimed a *second* and a *third kind*, licit and illicit. Affinity of the *second kind* bound each of the parties to the affines (by the first kind) of the other. It invalidated marriage to the third degree, and rendered it illicit to the fourth (2). Affinity of the *third kind* bound each of the parties to the affines (by the second kind) of the other ; it did not go beyond the second degree (3).

In addition to this, there was in the Canon Law yet *a fourth kind of affinity*. This was not affinity properly so called, arising from carnal intercourse, but rather a bond resulting from generation (4), and was known as the impediment *of children born of a second marriage :* « when a woman who had become a widow contracted a fresh marriage, not only did she remain affined to the kin of her first husband and transmit this relationship

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1. Caron, o. c., p. 125 s. and p. 134 ss.

2. See the *Collat. Brug.*, t. XII, p. 400 and l. c. ; Caron, o. c., p. 128.

3. *Collat. Brug.*, l. c.

4. This was not affinity properly so called, because, according to the definition given, and the proper and original sense of the saying : *affinitas non parit affinitatem*, this is not contracted by *generation*, but by *sexual intercourse*. Perhaps, too, this impediment would have been more correctly reckoned as a kind of public decency, as was done by some of the old decretists, as Gillmann shows, *Das ehemals..*, more particularly towards the end of his monograph. The term : *public decency* would then have to be understood not in its present sense, which restricts it to a determinate impediment, but in its natural and wider sense (see note to following n°), as including various matrimonial prohibitions, especially such as have no special juridical title. We may remark that Gillmann, l. c., p. 29-31, considers the case rather as depending on the impediment of affinity, of which it constituted a special extension ; children by a second marriage being supposed as one with their mother.

to her second husband, but also the children born of the second marriage *(proles suscepta ex secundis nuptiis)* could not contract marriage with the kin of her first husband to the fourth degree » (1).

Subsequently, the Fourth Council of Lateran, under Innocent III (1215), 1. suppressed the impediment of the second and third kind as well as the impediment of children born of a second marriage (2) ; and 2. by the same canon, limited the impediment of affinity of the first kind to the fourth degree, inclusively, of the collateral line ; finally, 3. the Council of Trent, as we have said above, reduced affinity arising from illicit intercourse to the second degree (3).

Civil law. **Scholion II. The legislation of the Code Napoléon** takes the same view of affinity as the ancient Roman law ; it, accordingly, makes the impediment consequent on *marriage* alone, even when unconsummated, and it knows nothing of illicit affinity (4). This impediment exists *in the direct line* in every degree, and in the collateral line in the first degree by the canonical reckoning (art. 161 s.). Dispensation can be granted, in Belgium, by royal authority for affinity in the collateral line, but not in the direct line (5). See the *Collat. Brug.*, t. XII, p. 122, and t. X, p. 606 s. (6).

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1. Esmein, o. c., I, p. 381, and *Collat. Brug.*, l. c.

2. C. 8, X, IV, 14 : « Seeing that the matrimonial prohibitions relative to *the second and third kinds of affinity*, and to *children born of a second marriage* in relation to the kin of the first husband, are a source of frequent difficulties,... repealing the provisions made on this subject,... we decree by the present Constitution that such persons shall henceforth be able to marry freely ».

3. On the subject of the *vota* laid before the Vatican Council, see the *Collect. Lacen.*, VII, 842, 673 s. ; Villien, *Les Réformes...*, in the *Canon Contemp.*, 1906, p. 67 ss., and 209 ss. Cf. also the note to n° 301, and the dissertation cited in the same place, from the *Archiv f. k. Kirchenr.*, 1910, p. 320 ss., where the early and certain abrogation of the fourth and third degrees of affinity in the collateral line, and, perhaps, also of the second degree is announced.

4. Thiry, o, c., n° 143. See, however, in Caron, o. c., p. 162, a decision of the tribunal of Tournai, « that natural relationship is formed by concubinage, and that a son, for example, cannot marry a woman who has been his father's mistress ».

By the law of England also, affinity arises only from marriage.

5. Having regard to the milder discipline of the Church in this matter, particularly since the modification that has been adopted in the matter of dispensation from affinity in the first degree of the direct line, difficulties may arise here also between the civil and ecclesiastical courts, when liberty to marry is conceded by the latter and refused by the former. In such a contingency, article VIII of the *Ne Temere* might also be considered as applicable here (*supra*, n° 69).

6. In the law of *Hammurabi* we find, par. 155 : « If a man has chosen a bride

ARTICLE 8. The Impediment of Public Decency.

308. *Definition of Public Decency;*

Public Decency is a kind of legal bond that arises from betrothment or from a ratified marriage, and exists reciprocally between each of the parties who have contracted with one another *betrothment* or a *ratified marriage* and the blood-relations of the other.

This bond takes its name from the reason for which the impediment was established, namely, because it is unbecoming and contrary to public decency to contract marriage with the kin of a former fiancée or of a former wife, even when the marriage has not been consummated (1). In due proportion, the reasons advanced against marriages between blood-relations and affines are applicable here. On account of its analogy with affinity, this impediment is also spoken of as *quasi-affinity*, for, as affinity is the result of the *carnal connection* between two persons and binds them respectively to their respective relations, public decency takes its rise from the *union of wills* which is brought into being by the consent given in betrothment or marriage, and unites each of the contracting parties with the blood-relations of the other (2).

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for his son, and if the son has known her, if the father himself has afterwards lain with her, that man shall be bound and cast into the water »; and par. 15: « If a man, after his father, is found lying with her who reared him, and who has had children (by that father), that man shall be driven out of the paternal home ».

1. Certain marriages seemed unbecoming, though for their annulment no special and determinate legal reason existed, either established by nature or expressly recognised in law, as for example consanguinity and affinity. The Church, however, determined to invalidate them and, in default of other motive, appealed to this general and indeterminate motive of propriety and public decency. This is why the impediment in question is so named, and it has become the custom to speak of a bond of public decency as existing between persons so united.

Moreover, in this matter the Church conformed to the *Roman law*. Following the legal rule, L. 197, D, L, 17: « *In marriage not only what is lawful, but also what is becoming must always be considered* », it established various matrimonial prohibitions on the ground of decency, notably between the fiancée and the relations of her betrothed in the direct line, between the concubine and the relations in the direct line of him with whom she had lived in concubinage (as understood by the Roman law). See on this, CARON, o. c., p. 67-72; GILLMANN, *Das ehemals*....., p. 30, note 2; LAFOURCADE, o. c., p. 71; ROCHE, o. c., p. 15.

2. In the Roman law it was also called affinity. See LAFOURCADE, l. c.

This bond extends only to the *blood-relations* of the fiancée (fiancé) or wife (husband), to the exclusion of their *affines;* but it affects indiscriminately legitimate and illegitimate blood-relations.

its different kinds.

There are *two* kinds of public decency, according as it arises from betrothment or from marriage. It, also, may be *simple* or *multiplex*, and for various reasons : either because it arises at the same time from betrothment and marriage ; or because one of the parties has contracted betrothment or marriage with several relations of the other (1) ; or because both parties have contracted betrothment or marriage with a blood-relation of the other ; or because the person desired in marriage is several times related to the former fiancée or wife.

Public decency is determined by indicating the degree and the line, together with the source from which it arises, viz., from betrothment or marriage ; it should be further stated whether it is simple or multiplex, and, if the latter, in what way.

The degrees and lines are reckoned in the same way as for affinity, according to what has been said in n° 303 and in the note.

Law in force.

The impediment of public decency invalidates, but only by the ecclesiastical law, the marriage of the parties concerned with the blood-relations of one another. Persons who have contracted with one another either determinate, valid and absolute betrothment, or a marriage absolute and not invalid through want of consent, are bound by this impediment, which, on the ground of betrothment, extends to the first degree only, and, on the ground of marriage, to the fourth degree inclusively.

Explanation.

309. Legal texts.

The whole of this question is regulated by a *twofold provision of the law*, interpreted by the Holy See, and in particular by Pius V, *Ad Romanum*, 1 July 1568. The *first decree* is that of Boniface VIII, cap. unic. in VI°, IV, 1. It enacts that betrothment does not

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1. E. g., if Titius, « after the dissolution of *valid betrothment* with Maevia, half-sister, by the father's side, of Caia (i. e., by the same father only), contracted another *valid betrothment* with Sempronia, the mother of Caia, or with Bertha, the uterine sister of Caia (i. e., by the same mother only) », this would result in a double impediment between Titius and Caia. Van de Burgt-Schaepman, o. c., I, n° 182a.

entail public decency except when absolute, determinate and in no way invalid through defect of consent; that, in this respect, a second betrothment has no effect upon the first (1); and that, for the rest, the discipline of the Council of Lateran as to the extension of the impediment to the fourth degree is to be observed. The *second decree* is that of the Council of Trent, c. III, Sess. XXIV, *De Ref. Matr.* This declares abrogated the impediment of public decency arising from betrothment that is invalid for any cause whatever; and, in respect of that which arises from valid betrothment, it restricts the impediment for the future to the first degree (2).

Now, according to the interpretation of the Holy See, on the one hand, the decree of Boniface VIII is to be understood of public decency arising not only from betrothment properly so called, sponsalia *(de futuro)*, but also of marriage *ratum non consummatum*, which, in that Pope's time, was also known by the name of sponsalia *(de praesenti)*; on the other hand, the decree of the Council of Trent concerns *only betrothment* or *sponsalia de futuro*, as Pius V (l. c.) authoritatively declares (3). Hence public decency arising *from marriage* is still subject to the regulations laid down in Book VI of the Decretals, while that which comes *from betroth-*

1. « Absolute and determinate betrothment, even if it was null on account of consanguinity, affinity, frigidity, religion, or for any other cause, apart from defect of consent, involved the impediment of public decency prohibiting and invalidating any subsequent betrothment or marriage, but not dissolving the previous betrothment. This is the reason why, if one contracted absolute and determinate betrothment with a woman, and if, in the sequel, he did the same with another woman, a blood-relation of the former, he would be under an obligation to marry the one to whom he was first engaged, in virtue of the first betrothment (which is in no way affected by the impediment of public decency arising from the second betrothment) ».

2. « The impediment of public decency is altogether done away with by the S. Council, when the betrothment is invalid for any reason whatever; and when it is valid, it shall not go beyond the first degree ».

3. « Of our own accord, in virtue of our Apostolic Authority, we declare and define by these presents, that the decree of the Council is to be understood absolutely in the sense that it applies to *sponsalia de futuro only*, and not, as alleged, to marriage already contracted; for that, the impediment still exists in all the cases and in all the degrees as established in the previous law, before the aforesaid decree of the Council. And we ordain and decree that all explain it thus ». See Feye, *De Imp.*, n° 387, who quotes the entire text of Pius V.

ment, properly so called, is regulated by the law of the Decretals as modified by the Council of Trent.

In the light of these explanations, there will be no difficulty in understanding the terms of the proposition :

310. The impediment of public decency arises :

A. *Concerning public decency arising* from betrothment :

1° from valid betrothment,

1. In accordance with the modifications introduced by the Council of Trent, the impediment does not arise from *invalid* betrothment, *whatever the cause of the invalidity may be* (1); whether it be the want of consent required by the natural law, or the absence of a condition or formality required by ecclesiastical law, on any ground whatever. Thus, that betrothment is invalid and does not involve the impediment in question, to which no sufficiently free or deliberate consent has been given, or to which the consent has been conditional, i. e., given under a suspensive condition incompatible with the substance of the contract, or under some other condition that remains unrealised (2) ; equally invalid is a betrothment contracted or to be contracted after Easter 1908 (3), whenever the formalities prescribed by the Decree *Ne Temere* have not been observed (4).

If a doubt arises as to the validity of a betrothment celebrated

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1. Before the Council of Trent, public decency resulted from betrothment that was invalid for any cause other than that of want of consent. See n° 309.

2. Even under the antetridentine discipline, conditional betrothment, in the sense indicated, did not involve public decency, since it was null through defect of consent. This is stated by the Decretal of Boniface VIII, already quoted : « If one has contracted betrothment under a condition with a woman, and if later, before the condition has been realised, he has contracted another per verba de praesenti (i. e., marriage) with a relation of the former, he must remain with the second, since conditional betrothment, before the realisation of the condition, does not entail public decency ».

3. For betrothment contracted before Easter 1908, one must judge of its validity in accordance with the previously existing law. The contract, even when oral and secret and made without witnesses, was then valid and involved public decency, as is clearly taught by the replies of the C. S. O., 11 Aug. 1852 (*Collectan.*, n° 1255) and of the S. Poenitentiaria, 10 Sept. 1834 (GASPARRI, o. c., n° 715).

4. See the description of these formalities in n° 7. The new discipline of Pius X will remove many difficulties ; and rarely, henceforth, will there be room to doubt the existence or the validity of a betrothment, which previously was of very frequent occurrence, since it could be contracted in secret, between the parties alone, and without special formalities.

under the new law or contracted under the former law, whether the doubt be one of fact or of law, the impediment of public decency will also be doubtful, in our opinion, and, indeed, with a doubt *of fact*, so that the Church would not supply in such a case (1). One could not then, under these circumstances, proceed with the marriage without having obtained a dispensation *ad cautelam* ; and a marriage thus celebrated, without a dispensation, would have to be revalidated *ad cautelam*, unless in the meantime it had been discovered that the betrothment was not valid (2).

to the first degree,

2. By the decision of the Council of Trent, l. c., the impediment arising from betrothment *no longer* extends *beyond the first degree*, either in the direct or in the collateral line. Hence a man cannot marry either, in the direct line, with the mother or daughter of his former fiancée, or with the fiancée of his father or of his son ; or, in the collateral line, with the sister of his fiancée, or with the fiancée of his brother.

3. The impediment continues to exist *after the dissolution of the betrothment*, even in respect of blood-relations of the betrothed person who were not born until after the dissolution.

and it continues to exist after the dissolution thereof.

B. *Concerning public decency arising* **from marriage** :

311.

As we have stated in nº 309, the discipline on this point was left untouched by the Council of Trent ; we must therefore refer to the law of the Decretals, and especially to the provisions of Boniface VIII. Now :

2º from marriage not consummated, to the fourth degree,

1. In conformity with these rules, the impediment arises from marriage (even not consummated), not only when it is valid, but also when it is *invalid*, provided that it be not invalid *through want of consent*.

whether it be valid, or invalid for a reason other than the want of consent.

The restriction contained in these last words has given rise to a *lively controversy* :

Is it a question only of the want of consent *required by the natural law for the substance of the contract*, or have we to take into ac-

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1. Boniface VIII rightly says that public decency arises only ex sponsalibus *certis* ; but it is clear from the context that by *sponsalia certa* he understands *determinate* betrothment, in opposition to that contracted vaguely with several persons, and not in opposition to doubtful betrothment.

2. Wernz, o. c., nº 450, III, and Gasparri, o. c., I, nº 716, are of a different opinion.

count also consent that is vitiated by the absence of a condition *which the positive law of the Church imposes upon its utterance ?*

According to the former opinion, marriage is null through want of consent, only when the consent has not been sufficiently deliberate or sufficiently free, or when it has been joined with either a suspensive condition incompatible with the essence of marriage, or with some other condition that has not yet been realised (1) ; or, finally, when one of the parties has been in error either on an essential point, or on an accidental point which he regards as of primary importance (qui redundet in substantiam).

According to the second opinion, the marriage would be also null on account of the want of consent, if one of the contracting parties were under a *canonical* impediment affecting the consent, i. e., annulling the marriage, not because of the inability of the person, but on account of the presumed insufficiency of consent. Of such a kind is the impediment of servile condition, as well as that of violence and of fear, when not taking away the use of reason. Moreover, those who hold the second opinion are divided on the question whether the impediment of clandestinity is to be considered as affecting the consent and, consequently, whether a clandestine marriage is also to be reputed null through want of consent.

Now, a/ the opinion is probable, and even more probable, which here considers want of consent only in relation *to the natural law*, and which, with reference to public decency, regards a marriage as valid, as far as consent is concerned, when all the elements requisite for naturally valid consent are existing together, even though there should at the same time occur some ecclesiastical impediment that affects the consent. Consequently, public decency also arises from a marriage that is invalid owing only to the canonical impediment of servile condition, of violence and fear, or of abduction.

The *reason* of this is that neither the text nor the context of the Decretal of Boniface VIII compels us to extend further the scope

1. In the very text of the Decretal, Boniface VIII expressly declares that conditional marriages, like *conditional* betrothments, do not entail public decency, unless the condition is realised. His words are : « ex sponsalibus (de praesenti et de futuro) *puris*... ».

of the words « provided that it be not null through want of consent ». We may truly say that matrimonial consent exists, when we find united all the elements of which it is composed in the natural law, even in the presence of a canonical impediment that annuls the consent. Besides, it is sufficient that there should be a naturally valid consent in order to have ground for the bond of public decency, namely, the union of wills ; and the Decretal seems to have had in view the preservation of the very ground of the impediment (1).

The force of this reason is certainly considerable ; nevertheless, it does not seem to be so cogent as to deprive the opposite opinion of all probability. For, notwithstanding this, one can continue to maintain with probability that when the Church, for the recognition of the canonical effects of a marriage, requires a contract that is valid in the matter of consent, to the exclusion of all other, it understands thereby a consent such as its laws impose (2).

b/ But even if it were necessary to admit this second opinion, we should have to except the impediment of clandestinity, which does not seem in any way to anul the consent itself.

For clandestinity was established by the Council of Trent as an impediment affecting the parties personally, as we have shown in n° 63 ; and under the new discipline of the Decree *Ne Temere,* it affects rather the *form* of consent than the consent itself. The prescribed form is not imposed because consent given in any other way is presumed to be insufficiently free and deliberate, but in order that there may be certain proof of it. One may, moreover, invoke in favour of this opinion the documents cited by Feye, *De Imp.*, n^{os} 400-407, who gives an account of the whole of this controversy, and relies especially on the decree of the S. C. C., of 8 Nov. 1584, quoted by Fagnanus,and on the reply of the S. Poenitentiaria, of 13 March 1820.

We may therefore conclude, in the first place, that marriage, invalid on the sole ground of clandestinity, *certainly* involves the impediment of public decency, equally with marriage that is inva-

1. Cf. Van de Burgt-Schaepman, o. c.. I, p. 218 s.

2. See the account of this controversy in Wernz, o. c., n° 453, note 46.

lid on account of consanguinity, affinity etc. ; in the second place, that it is *more probable,* but not certain, that marriage, null on the ground of an *ecclesiastical impediment* affecting the consent itself, gives rise to public decency, provided the consent be *naturally* valid ; accordingly, since it is a question of a doubt of ecclesiastical law, one can proceed with the marriage without a dispensation : though it is better to refer the matter to the Bishop, if there is time to do so.

Such is *the law.* We must, however, make a *twofold exception* :

α/ *Civil marriage,* however contracted, even with consent valid before the natural law, never gives rise to public decency (1), when contracted by those who are subject to the law of clandestinity (2).

β/ Non-clandestine marriage of *impuberals, under the discipline of the Council of Trent,* was equivalent to betrothment (3), and gave rise to public decency only on this head (4). But under the disci-

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1. We quote the words of Leo XIII, 17 March 1879, confirming the decree of the S. C. C., of the 13th of the same month. He says : « As to the act in question, commonly called *civil marriage,* in places where the decree of the Council of Trent, Sess.XXIV, c. 1, *De Ref. Matr.*, has been promulgated : whether the faithful in performing it (after having duly contracted religious marriage, or with the intention of doing so as soon as possible), have the legitimate intention of going through a simple civil formality, or whether they intend thereby to contract betrothment (sponsalia de futuro), or even, in ignorance or contempt of the laws of the Church, have the intention of contracting marriage (de praesenti), such act produces no impediment of public decency ».

Undoubtedly in the first two hypotheses, the decree in question is simply declaratory of the existing law, since in these two cases the civil marriage is certainly null through want of consent ; as to the third hypothesis, it there makes a derogation from the law in force, given that the marriage is supposed to be valid on the head of consent.

2. The decree we have just quoted concerns only civil marriage contracted in places subject to the discipline of the Council of Trent ; but since the recent decree *Ne Temere* has extended the law on clandestinity to the entire world, we are of opinion that, henceforth, it is the *persons* subject to this new regime that must be taken count of.

3. See above, nº 9, and also the documents quoted by GASPARRI, o. c., I, nº 723, and by LEITNER, *Lehrb.*, p. 245.

4. Logically, marriage of impuberals ought to produce the impediment of public decency on the ground of marriage and not on that of betrothment, since the want of age affects the ability of the parties, and consequently does not render the union invalid through defect of consent.

pline of the Decree *Ne Temere,* taking into consideration the abrogation of betrothment presumed on the ground of marriage contracted between impuberals subject to this decree, it seems that public decency no longer arises therefrom (1).

2. The impediment arising from marriage extends *to the fourth degree* between the one party and the blood-relations of the other. For Pope Boniface (whose prescriptions relative to this kind of public decency we have said were retained by the Council of Trent) preserved the discipline of the Council of Lateran (c. 8, X, IV, 14), reducing to the fourth degree inclusively the impediment of consanguinity.

3. The impediment of public decency cannot exist *to the prejudice of a previous betrothment* that has not been dissolved, as is clear from the following passage of the Sixth Book of the Decretals : « Therefore, if a man has contracted a marriage, unconsummated, with a blood-relation of his former fiancée, such marriage does not produce the impediment of public decency with this latter, should she be even the sister of the person married ; it produces it only with the other blood-relations to the fourth degree » (2). The man concerned would, therefore, remain under the obligation of marrying his former fiancée, supposing, of course, that the betrothment continued to exist.

This impediment does not prejudice previous betrothment ;

4. Just as the impediment of public decency arising from betrothment continues to exist after its dissolution, the like impediment resulting from marriage endures *after the dissolution of the latter,* whatever the cause of the dissolution may have been, and it binds even the children born after the dissolution of the marriage.

it continues to exist also after the dissolution or consummation of the marriage.

The impediment of public decency remains also *after the consum-*

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1. The conclusion, therefore, is : every marriage, even an invalid one, gives rise to the impediment of public decency, except a/ marriage invalid through want of consent requisite for the nature of the contract ; b/ marriage civilly contracted between persons subject to the Decree *Ne Temere* ; c/ marriage of impuberals.

2. The same principle applies also to public decency arising from *betrothment,* since the decree of Boniface VIII makes no restriction. But the matter is no longer practical, since the Council of Trent has decreed that invalid betrothment has ceased to produce public decency. On the ground of the former betrothment, the others would be null within the limits to which the impediment could extend, that is to say, to the first degree.

mation of the marriage (1). When, therefore, it is said that public decency arises from marriage contracted and not consummated, this statement must be understood as signifying that the consummation of the marriage is not necessary for the existence of the impediment, not that the impediment lapses on consummation. Observe, however, that in applying for a dispensation, it is sufficient to make mention of the impediment of affinity arising from licit intercourse, in order to express the two impediments of public decency and of legitimate affinity (2).

312. It is an impediment of ecclesiastical law only.

C. The impediment of public decency, whether arising from betrothment or from marriage, is **of the ecclesiastical law only**; this clearly follows from all that has gone before, and is, moreover, the common teaching. The natural law furnishes a foundation for the invalidating law of the Church, but it cannot be said to be so outspoken on the point as to invalidate marriage of itself (3).

313. Historical notice.

Scholion I. The legal evolution of this impediment has been explained above already, especially in the note to n° 308 ; it does not date back beyond the eleventh or twelfth century, and its sources are obscure and difficult to trace. We have also stated in the same place why, and under what form, the Roman law admitted it.

Civil law.

Scholion II. The Code Napoléon does not recognise this impediment. On the one hand, the bond resulting from an unconsummated marriage constitutes in its eyes, as in those of the Roman Law, an impediment of affinity ; on the other hand, the Code does not admit the impediments which the Roman Law had established on the ground of public decency, especially in connection with betrothment, since it holds this as non-existent (4).

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1. This is true even in the case of an invalid marriage, as the decree of the S. C. C. declares, 3 Dec. 1667, quoted in n° 305, in a note ; *a fortiori*, then, in the case of a valid marriage.

2. In the case of a *valid* consummated marriage, there are always at the same time affinity and public decency. If the consummated marriage is *invalid*, it may happen, beyond the second degree, that public decency alone exists ; for, when a marriage, null for other reason than that of want of consent, has not the appearance of marriage, it involves public decency to the fourth degree, but gives rise to illegitimate affinity only to the second degree. See above, n° 305.

3. Accordingly, *unbaptized persons* are only *indirectly* affected by this impediment, as stated in n° 222 ; moreover, the Church can dispense in this matter, and does dispense in all cases, in every line and in every degree.

4. The law of Hammurabi recognises a certain bond of public decency arising from unconsummated marriage ; for, in par. 156, it declares : « If a man has

Article 9. The Impediment of Spiritual relationship.

I. Definition.

314. *Definition of Spiritual Relationship;*

Under the existing discipline (1), Spiritual Relationship is that which arises from the sacraments of Baptism and Confirmation, and which exists between the minister of the sacrament, the godfather and the godmother on the one part, and the person baptized or confirmed and his parents on the other part.

The *foundation* of this impediment is the sacrament of regeneration completed by Confirmation, whence there arises for the minister, the godfather and the godmother, a spiritual *paternity* in respect of the person baptized or confirmed, and a *compaternity* in respect of the natural parents of the same (2).

its different kinds.

Spiritual relationship may also be *simple* or *multiplex*. It would be *multiplex*, a/ if one were the godfather of a child at baptism and at confirmation successively ; b/ if one baptized a child and at the same time acted as its godfather ; c/ if one baptized both parent and child, or acted as godfather (or godmother) to both of them (3).

II. Law in force.

315. *This impediment arises from Baptism and Confirmation ;*

Spiritual relationship, arising both from Confirmation and from Baptism, constitutes, under certain conditions, an impediment of the ecclesiastical law, invalidating marriage : 1. between the minister of the two sacraments, the godfather and the godmother, on the one part, and the person baptized or confirmed, on the other part (impediment of paternity) ; 2. between these same, minister, godfather and godmother, on the one part, and the natural parents, legitimate or illegitimate, of the per-

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chosen a bride for his son, and if his son has not yet known her, and if the man himself has slept with her, he shall pay her a half-mina of silver, and shall return to her in its entirety all that she has brought from her father's house, and she shall marry whom she shall wish ».

1. An account of the ancient discipline will be given at the end of this article, in a Scholion.

2. The compaternity that the existing law has maintained is only *direct* compaternity ; formerly there was also an impediment of *indirect* compaternity and of *fraternity*, which we shall speak of later.

3. Spiritual relationship, on the other hand, is not made multiplex by the fact that the same person has been successively the godfather of *several* children of the *same parents*, for the *same* sacrament. C. S. O., 29 Apr. 1894.

son baptized or confirmed, on the other part (impediment of direct compaternity).

Explanation.

and exists between the minister, the godfather and the godmother, on the one part, and the baptized or the confirmed and the parents of the same, on the other part,

A. The **limits** of this impediment were established by the Council of Trent, Sess. XXIV, c. 2, *De Ref. Matr.*, which ordains « that, in accordance with the provisions of the sacred canons (1), one person only, whether man or woman, or at most one man and one woman, shall receive in baptism the person baptized; between whom and the baptized and his parents, as also between the person baptizing and the person baptized, and the parents of the baptized, and these only, shall spiritual relationship be contracted... In like manner, that relationship which is contracted by confirmation shall not extend beyond the person who confirms, the person confirmed, and his parents, and the person acting as sponsor ; all other impediments arising from the said spiritual relationship between other persons being altogether removed » (2).

The impediment exists *as many times as* there is relationship, and in applying for a dispensation it is necessary to state its origin and its multiplicity : whether it arises from Baptism or from Confirmation, from paternity or from compaternity.

It is the unanimous opinion that this impediment is *of the ecclesiastical law only*.

316. under the conditions required by law, as concerns the sacrament,

B. The **Conditions** established by law are the following :

1. *As concerns the sacrament :* it is necessary that it should be *received validly*. Invalid Baptism or Confirmation has, therefore, nothing to do with the matter.

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1. X, IV, tit. 11, *De Cognatione spirituali*, c. 3, in VI°, IV, 3.

2. Giraldi, *Expositio Juris Pontificii*, P. I, sect. 702, quotes the Constitution of Pius V, *Cum illius*, of 28 Nov. 1566, in which, interpreting the decree of the Council of Trent, the Pope declares that *indirect* compaternity no longer carries with it the impediment, and that only direct compaternity invalidates marriage ; consequently, that there is no longer any impediment between the person baptized or confirmed and his parents, on the one part, and the *husband or wife* of the person baptizing or of the godfather and godmother, on the other part. Cf. Scholion.

The Council of Trent reduced the impediment to the above-mentioned limits, because experience had proved that « in consequence of the great number of prohibitions, many marriages were, in ignorance, contracted in prohibited cases ».

If the sacrament is *doubtful*, the impediment also is doubtful, and with a doubt of fact. Thus, for example, if a doubtfully valid Baptism is repeated, both Baptisms give rise to a doubtful relationship (1).

It does not matter if the Baptism has been administered *privately and without the ceremonies :* for a reply of the S. C. C., of 5 March 1678, declares that the impediment is contracted in such a Baptism, not only by the *minister*, which no one denies, but also by the *godfather* and *godmother* (2) ; for the spiritual relationship arises from the sacrament, not from the ceremonies (3). See the *Collat. Brug.*, t. XI, p. 27 s.

2. *As concerns those who contract spiritual relationship :* it is necessary, in the case of Baptism, that they be baptized, and in the case of Confirmation, subject to the restriction that we shall presently point out, that they be confirmed. Consequently, *ministers* of the sacrament and *sponsors* do not contract spiritual relationship in Baptism or Confirmation, unless they are themselves baptized or confirmed (4) ; but as regards the *parents* of the person baptized or confirmed, they contract the relationship if they are baptized (5), but it is not necessary that they should have been confirmed.

those who contract spiritual relationship ;

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1. It is advisable to settle the doubt by taking, in the conditional repetition of Baptism, the same sponsors as in the former doubtful administration. If afterwards it is ascertained whether the first or the second baptism was valid, one must decide in accordance with this objective validity the existence of the spiritual relationship, and consequently, perhaps, the validity of a marriage that has been contracted. See Van De Burgt-Schaepman, o. c., I, nº 172.

2. To the question : « Does the provision of the Council, c. 2, Sess. XXIV, *De Reform. Matr.*, which decrees that in the sacrament of Baptism there is a spiritual relationship between the sponsors and the parents of the person baptized, apply to Baptism administered at home without solemnities in case of necessity ? », the S. C. C. replied : « *affirmatively* ». On the reasons urged against the opinion propounded, see Van De Burgt-Schaepman, o. c., I, p. 206-208. On the question as to whether it is necessary to have any sponsor in private Baptism, see the *Collat. Brug.*, t. XI, p. 661, and p. 27.

3. Whence it also follows that in the simple supplying of the ceremonies, neither minister nor sponsor contracts spiritual relationship.

4. C. 102, Dist. IV, *De Consecratione*. See also the declaration of the S. C. C., 13 June 1634, cited by Giraldi, l. c., sect. 710.

5. Therefore *unbaptized* parents contract neither the impediment, nor even the spiritual relationship. Hence, neither minister nor sponsor is spiritually

and the office of godparents.

3. As concerns the office of sponsors, it is necessary :

a/ that they have the intention, at least virtual, of exercising the office in question (1).

Therefore, neither a child who has not yet reached the use of reason, nor an adult deprived of the use of reason, nor one quite inebriated, can validly act as a sponsor. Observe that it is not sufficient to exercise this office in a merely material way, it must be exercised formally ; consequently, one who does not know that he is acting as godfather acts invalidly, and he cannot afterwards make good the defect by forming an intention ; the intention must precede the exercise of the office. This point should be especially attended to in cases of sponsorship *by proxy* (2).

b/ They must not be *under any* substantial *error as to the* person, or, at least, they must have the absolute intention of being sponsor to the person present.

c/ That they have really touched (3) or held the person baptized (4). According to the declaration of the S. C. de P. F., 21 Jan. 1856, « there is no need that one should really carry the child, for in order that the sponsor may be said to hold it, it is enough that, according to the usual practice, he should *physically touch* it, and

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related to an unbaptized father ; for spiritual relationship supposes *both* parties to the relationship raised to the supernatural state. See Wernz, o. c., n° 490 ; Gasparri, o. c., n° 740.

1. The intention of *contracting spiritual relationship* is not needed.

2. When one is represented *by a proxy*, it is the principal himself who is the godfather and who contracts the spiritual relationship,not the substitute who acts in his name ; but it is necessary that the commission should precede the exercise of the office. Consequently, one is not a godfather, when, without his knowledge, he has been chosen as such and someone has held the child in his name, unknown to him,even though his intention could be presumed; nor he, who, having been chosen, has accepted the office of godfather, but has not named anyone to act for him, even when another, presuming on his consent, has acted in his place. See the Roman decisions in Rosset, o. c., n° 1845, and De Becker, *De Matr.*, p. 223, and especially the Instr. of the C. S. O., 15 Sept. 1869, in the *N. R. th.*, IX, p. 555 ss.

3. Fagnanus *(Commentar. in IV L. Decretalium,* cap. *Veniens,* n^os^ 1-9), proves that a *moral* touching does not suffice, and shows how it is insufficient.

4. What we say of the touching required in Baptism, applies, in due proportion, to Confirmation. Formerly, in Baptism given by immersion, the sponsor took, i. e., drew back, the baptized person from the font. Whence come the expressions : *suscipere, levare e fontibus*. See the *Kirchenlexicon,* under *Pathen.*

so uniting himself with the person who carries it, should accompany the same to the pouring of the water ; it is not necessary that the godfather or godmother should take the child from the hands of the person who carries it, in order to present it to the priest for Baptism » (1). It is, therefore, sufficient that the godfather or godmother should, during the sacramental ablution, place the hand upon the shoulder or breast of the child, even over its clothes ; or, that the same should receive the child directly from the hands of the minister, without having touched it during the administration of the sacrament ; or, again, at least according to the more probable opinion, that the godfather or godmother should have presented the child to the minister immediately before Baptism (2).

d/ If a sponsor has been *chosen*, it is necessary that such should be *lawfully* chosen.

This choosing is prescribed (3) ; and, if it has really taken place, then it is a condition *sine qua non* for fulfilling the office of sponsor ; no one but the person chosen can then act validly. The persons chosen, who in other respects fulfil all the required conditions, validly exercise their office, even should it happen, contrary to the provisions of the Council of Trent, that there are more than one godfather and more than one godmother ; the clause prescribing that there shall be *but one godfather and one godmother*, is merely prohibiting and *not invalidating* (4).

Observe that the choosing, though prescribed, is not imposed *under pain of nullity*. Therefore, in default of such choosing, any person can validly exercise the office of sponsor, even, in our opinion, when there are more than one man or more than one woman (5).

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1. *Collectanea*, n° 627.

2. These last two cases concern those places where it is the custom for the priest himself to hold the child when baptizing it. See the decree of the S. C. C., 20 Dec. 1653 ; FAGNANUS, o. c., cap. *Veniens*, n° 13 s. ; FEYE, *De Imp.*, n° 418 ; GASPARRI, o. c., n° 744, b/ ; WERNZ, o. c., n° 492 ; *Collat. Brug.*, t. XI, p. 30.

3. Council of Trent, Sess. XXIV, c. 2, *De Reform. Matr.*

4. Cf. REIFFENSTUEL, *Jus canon. universum*, L. IV, Tit. 11, n° 21 ; FEYE, *De Imp.*, n°s 420, 422 and 423, who holds as more probable the opinion that restricts *to Baptism* alone this provision of the Council of Trent concerning the choosing of sponsors ; ROSSET, o. c., n° 1890 ; GASPARRI, o. c., n° 744 ; DE BECKER, *De Matr.*, p. 222 ; LEITNER, *Lehrb.*, p. 258 ; *Kirchenlexicon*, l. c.

5. See SCHERER, o. c., p. 319, note 45 ; FEYE, *De Imp.*, n° 421 ; ROSSET, o. c., n° 1889.

e/ *They must not have been rejected for a just reason* by the Bishop, the parish priest, or his delegate (1).

Practical observation.

Note. 1. Parish priests ought to keep an eye on this impediment, especially when there is question of a marriage between affines or between persons bound to one another by a long friendship, in accordance with what is said in the *Liber Manualis* of the diocese of Bruges, p. 189, which may be taken in conjunction with what we shall presently have to say regarding the duties of the parish priest with respect to those about to marry. It is also prudent not to admit a godfather in the Baptism of *illegitimate* children, not merely for the purpose of avoiding the solemnities, but especially to prevent the occurrence of an impediment, should the godfather subsequently marry the mother of the child (2).

2. As to the effects that spiritual relationship, *supervening* during marriage, produces on the use of it, see above in n° 140.

317. The unbaptized are bound neither directly nor indirectly by this impediment.

Corollary I. The *unbaptized* are not *directly* subject to the impediment of spiritual relationship, nor even *indirectly* so, in view of its special nature. For this relationship, as we have observed in n° 316, cannot be contracted by a baptized person in respect of one who is not baptized, and consequently, there cannot exist between such persons a corresponding impediment, not even by the communication of the disability of the one party to the other ; and if subsequently the unbaptized party receives Baptism, the impediment will not then arise (3).

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1. It is true that the choosing does not primarily rest with the parish priest or the Bishop, but rather with the person to be baptized and his parents, and, in their default only, with the other two. But observe that this choice made by the parties concerned is looked upon as being made for the parish priest (or the Bishop), as minister of the sacrament and guardian of the laws of the Church, i. e., that the sponsors chosen are in a certain way presented for admission to their office ; whence it follows that the parish priest may reject the unworthy and such as the law excludes, so that they are rendered incapable of validly discharging their office. On the other hand, one who has been duly and lawfully chosen cannot be set aside without just cause, and, in the event of unjust rejection, he validly exercises his office of sponsor, if in other respects he fulfils all the requisite conditions.

2. See the *Liber Manualis* of the diocese of Bruges, p. 189, and the *Collat. Brug.*, t. IV, p. 556.

3. See above, n^{os} 222 and 316, 2°, and the note.

Corollary II. The Church can *dispense* in all cases of spiritual relationship ; and it does so, but with more difficulty in the case of paternity than in that of compaternity. The Church deals liberally with the matter in the *indults* that it grants. No exception on this head is made in the very extensive powers granted in 1888 ; but the ordinary powers, and especially the *Quinquennial Faculties* of the Bishops of Belgium delegate only the power of dispensing from the impediment of compaternity, to the exclusion of the impediment of paternity between spiritual parents and the person baptized (1). *The Church can dispense from it.*

318. Ancient discipline.

Scholion. From the earliest days of the Church, the *ministers of Baptism* were looked upon as the spiritual parents of those whom they baptized ; and St Paul calls those whom he had converted and baptized his spiritual children. At a later date, this bond of spiritual paternity was extended to *sponsors*. These, after having been originally admitted in Baptism (2) as sureties and guarantors, afterwards came to be considered as spiritual parents or godfathers, by analogy with the minister of the sacrament ; and this spiritual paternity is to be understood in the sense af an intimate participation in the sacrament of regeneration (3).

Subsequently, this relationship was further extended to those employed in the *catechetical* preparation of others for Baptism, as well as to the minister of, and the sponsors at, *Confirmation*, which completes the former sacrament (4) ; and even, according to some, to the minister of the sacrament of *Penance*, which gives back to life those who are spiritually dead (5).

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1. Formerly the spiritual relationship « *inter levantem et levatum* », i. e., between the sponsor and the person baptized, was expressly excepted, and as a consequence the exception was extended to the minister of the sacrament ; but at the present day mention is made in all letters of the exception concerning the minister, according to the decree of the C. S. O., 3 Dec. 1902. See, on this, the *Collat. Brug.*, t. VIII, p. 399 ss. ; X, p. 489 s.

2. There were also godfathers *of Catechism*, i. e., those who assisted and instructed catechumens in their preparation for Baptism ; the same persons ordinarily acted later as sponsors at the actual Baptism and at the Confirmation which immediately followed. See *Collat. Brug.*, t. XI, p. 27.

3. *Collat. Brug.*, t. XI, p. 30 ss.

4. The spiritual relationship resulting from Baptism, from Catechism and from Confirmation was long considered as forming but one, because ordinarily the same minister and the same sponsors acted at each in turn.

5. Many Doctors and Decretists in the Middle Ages, and among them Magister Rolandus, afterwards Alexander III, admitted the existence of a spiritual

Originally it was the common practice to have sponsors of the same sex as the person baptized ; but later, from the time when sponsors of a different sex were admitted, the spiritual relationship arising from Baptism, and also, by extension, from Catechism and Confirmation (and, according to some, from Penance), began to be looked upon as an *impediment to marriage* (1). The first traces of this are found in the Council *in Trullo* (692), and in that of Rome (721), which set up an impediment between sponsors and the natural parents of the person baptized (2). By degrees this impediment became so greatly extended that there was not only an impediment of *paternity*, but also of *compaternity*, *direct* and *indirect* (3), and even one of *fraternity* (4).

A more detailed account of the various stages of this development may be found in Esmein, o. c., II, p. 364 ss., and in Freisen, o. c., p. 507 ss. This latter author maintains (p. 531-532) that there never has been any impediment between godfather and godmother (5), and his opinion is clear-

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relationship between *confessor and penitent* and a consequent impediment to marriage ; in respect of the penitent, however, the majority did not extend it, as in the case of the impediment of spiritual relationship arising from Baptism, to the children of the confessor, if there were any. But one cannot deny that the existence of a spiritual bond between confessor and penitent was recognised, whence sexual relations between such persons were generally considered as incestuous ; but the invalidating or prohibiting power of this bond was not established by any provision of the law, and Boniface VIII (c. 3, in VI°, IV, 3), in order to put an end to the controversy, declared that, apart from the relationship arising from Baptism (with its preparatory Catechism), and from Confirmation, « there results from the administration of the sacraments no spiritual relationship, which has the effect of prohibiting or dissolving marriage». See Gillmann, *Das Ehehinderniss des geistlichen Verwandschaft aus der Busse.*

1. The impediment of *Catechism* was only *prohibitive*, according to the authoritative interpretation of the decree of Clement III by Boniface VIII, c. 2, in VI°, IV, 3.

2. The edict of Justinian, L. 26, *De Nuptiis*, V, 4, forbids marriage between godfathers and godmothers and their godchildren by Baptism.

3. « La *compaternitas directa* était celle... qui existait entre le père et la mère naturels d'une part et le père et la mère spirituels d'autre part. Mais chacune de ces personnes était aussi dans les mêmes relations vis-à-vis du conjoint de son compère et de sa commère, pourvu que ceux-ci eussent été mariés et leur mariage consommé avant la cérémonie du baptême ou de la confirmation d'où naissait la *cognatio spiritualis* ». Esmein, o. c., I, p. 371.

4. « Le *baptizatus*, *filius spiritualis*, fut considéré comme le frère spirituel des enfants naturels de ses *parentes spirituales*, et, par voie de conséquence, le mariage fut déclaré interdit et nul entre lui et eux ». *Ibid.*, p. 372.

5. By *compater* and *commater*, between whom the impediment exists, are un-

ly confirmed by GILLMANN, *Das Ehehinderniss der gegenseitigen geistlichen Verwandtschaft der Pathen* (1). See also the *Archiv f. k. Kirchenr.*, 1908, p. 556 s. ; and the *Canon. Contemp.*, 1907, p. 343.

Boniface VIII, who, as we have seen, recognises, in c. 2, in VI°, IV, 3, a prohibiting impediment arising from Catechism, declares, in c. 3 of the same, that the impediment of spiritual relationship does not come from any sacrament other than those of Baptism and Confirmation. The Council of Trent suppressed the spiritual relationship together with its prohibiting impediment arising from Catechism ; and further, in the case of both sacraments, it *abrogated* the impediment of *fraternity* and that of *indirect compaternity*, retaining only paternity and direct compaternity, so that spiritual relationship and its invalidating effects were restricted to the person baptized and his parents on the one part, and to the sponsors and minister on the other part. Sess. XXIV, c. 2. *De Reform. Matr.* (2).

ARTICLE 10. Legal Relationship.

319. State of the question.

Preliminary notions. It is very difficult to determine the canonical impediment of legal relationship. The whole question seems to rest on this principle, viz., that the Church formerly admitted among the impediments of marriage the invalidating adoption of the Roman Law of Justinian, but without giving it the same extension.

In fact, 1. the Church admitted this impediment, in accordance with the Roman Law. This can be deduced from c. 1, Causa XXX, qu. 3(3), and from BENEDICT XIV, *De Syn. dioec.*, l. IX, c. 10, n° 5. 2. The Church did not

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derstood not the godfather and the godmother in relation to one another, but the spiritual father on the one part, and the natural mother of the same child on the other part, and vice versa.

1. We refer the reader also to the same article, where, on p. 688 and 710 s., the author shows the excessive extension of the impediment of spiritual relationship, as it existed formerly. He quotes Johannes Andrea as enumerating *twenty* cases « in which spiritual relationship prohibits and invalidates marriage ».

2. With the view of still further reducing the extension of the impediment, the Council also confirmed, but without an invalidating clause, the old decree forbidding the choice of more than one godfather and godmother ; for the custom had been introduced, especially in noble families, of appointing more, and sometimes even a ridiculous number of them, as we have shown in the *Collat. Brug.*, t. XI, p. 38.

3. « The venerable (Roman) laws do not permit marriage between those who are children by nature and those who are such by adoption ». Such is the answer of Nicholas I (866) to the *Consulta Bulgarorum*. It is from this answer that the cap. unic. of L. IV, X, 12, *De Cognatione Legali* is taken.

adopt the Roman Law simply and in its entirety, at least from the time of the Middle Ages. The proof of this is to be found in the canonists and decretists of that period, and especially in St Raymond de Pennafort, who, shortly after the appearance of the decretals of Gregory IX, fixed, in his *Summa*, the extent of the canonical impediment within narrower limits than those of the Roman Law (1). Benedict XIV also takes the same line, l. c., n° 4. See SCHERER, o. c., II, p. 325 ss., and in the contrary sense GASPARRI, o. c., I, n° 752. In accordance with these notions, we will inquire, 1. if, *under the existing discipline*, there is still a canonical impediment of legal relationship ; and 2. what is the extent of the same.

I. The existence of the impediment.

320. Proofs of the existence of this impediment.

We must see, in the first place, what sort of adoption it was that invalidated marriage in the Roman Law of Justinian ; and, in the second place, whether the same kind of adoption exists at the present time in our (i. e., Belgian) Code. If it does, we must then admit the existence of the canonical impediment of legal relationship (2).

Now, as concerns the **first point** :

The Roman Law distinguished *two kinds* of adoption : *solemn* adoption or *adrogatio*, i. e., adoption of a person who is his own master, *sui juris*, which took place with certain ceremonies, and by the authority of the Head of the State ; and *simple* adoption, or adoption of a son of the family, which took place with less ceremony, and by the authority of the judge or magistrate (3).

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1. Thus, according to L. 17, 55, *Dig.*, XXXIII, 2, and § 5, *Instit.* I, 10, there existed an impediment between the adopted son and the sister and even the paternal or maternal aunt of the adoptive father. This the canon law did not at all admit.

2. This conclusion is legitimate, but we must explain its scope. The invalidating power of the canonical impediment comes, not from the Roman Law, but solely from the Church, in that it here sanctions the Roman Law. It is necessary to make this statement with regard to the Roman Law, and, a fortiori, with regard to our own civil laws regulating adoption. These latter can only determine in each country whether there does or does not exist a kind of adoption like to that of the Roman law. When the case occurs, the Church sets up its impediment, without regard to the action af the modern civil law in the matter.

3. Book I, *Dig.*, tit. 7 ; *Instit.*, I, tit. II : « Adoption is made in two ways : either by a rescript of the prince, or by authority of the magistrate. By authority of the emperor, one can adopt those (male or female) who are *sui juris* : this kind of adoption is called *adrogatio*. By authority of the magistrate one can adopt those (male or female) who are still subject to paternal authority ».

Originally, this second kind of adoption, like the former, had the effect of causing the person adopted to come into the family and under the power of the adopter; but later, owing to a decision of Justinian, this was no longer the case in the simple adoption of a son of the family (1), except when the child was adopted by his grandfather or great-grandfather, so that then the natural rights and those of adoption were concentrated in one and the same person (2).

From this, modern writers take occasion to divide Roman adoption rather, in accordance with its effects, into *perfect* (or *complete*) and *imperfect* (or *incomplete*); the former transferring the person adopted to the power of the adopter, as was the case in solemn adoption or *adrogatio*, as well as in simple adoption, when the adopter happened to be the grandfather or great-grandfather of the person adopted; the second effecting no transfer, as was ordinarily the case in simple adoption.

Apparently *both kinds* of adoption constituted a diriment impediment to marriage in the law of Justinian (3); not merely perfect adoption, as some maintain (4).

Our opinion rests 1. on the fact that the Roman law annulling marriage

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« In the former case, adoption is an act of *public law*... ; in the second case, it belongs to the domain of *private law* and is called *adoptio per aes et libram*. *Adrogatio* is effected *per populum*, because the populus alone exercises the jus necis over citizens sui juris, and in the case of adrogatio, on one who is sui juris becoming alieni juris, the people renounces, in favour of the adoptive father, the exercise of this right over a citizen.... Adoption *per aes et libram* is a civil act which takes place between the two parties interested, in presence of a judicial magistrate». P. Willems, o. c., p. 67 s. ; the author also describes in detail the ceremonies of the adrogatio.

This shows us that originally the difference between adrogatio and adoption was properly only an *accidental* difference, based on the diversity of the formalities required in either case ; for one sui juris there was need of the intervention of the prince or the people, seeing that these were considered as having authority and protective power over him, while this intervention was unnecessary for the adoption of one who was still under the power of another.

1. *Instit.*, l. I, tit. II, *De adoptionibus*.

2. *Ibid.*

3. It is of a diriment and not of a merely prohibiting impediment that the Roman law speaks, as is clear from the *Instit.*, l. I, tit. 10, § 12.

4. The *N. R. th.*, I, p. 1-30, gives an account of the whole of this controversy and adds a long list of authorities who are opposed to our opinion. There are others, however, who are on our side, and among them Scherer, o. c., II, p. 323 s.; Rosset, o. c., n° 1907; Wernz, o. c., n^{os} 469 and 472, and Gasparri^{3}, o. c., n. 858. Among present day opponents, we may mention especially De Becker, *De Matr.*, p. 212 ss., who has in his favour the *Instr. Austriaca*, § 28 and 29.

does not seem to have been restricted merely to perfect adoption. Thus, the *Instit.*, I, tit. 10, *De Nuptiis*, § 1, declare every marriage prohibited on the ground of adoption, without any restriction. Observe also that the distinction is wanting in the very book in which Justinian mentions the two kinds of adoption, the one perfect and the other imperfect. So, too, no distinction is made in the text of Nicholas I, already cited, nor in that of the Decretal of Gregory IX, both of which recognise the existence of an impediment arising from adoption.

2. It rests, in the second place, on the fact that,in the *Instit.*, I, tit. 10, the person adopted is everywhere considered, without any distinction, as the son of the adopter, and this latter as holding the place of father (1), and on the fact that it is precisely this quasi-filiation which serves as the reason for the establishment of the impediment, by analogy with natural relationship (2).

Moreover, the view that we take is strengthened by what we shall have to say later, while the contrary is not proved by the passages from L. 14,17, 55, *Dig.*, XXIII, t. 2, *De Ritu Nupt.*, which our opponents allege as admitting the impediment of legal relationship only when the adopted was placed under the power of the adopter ; in fact, these passages make no distinction, and are taken from a law earlier than that of Justinian, which, in every adoption, caused the person adopted to pass under the power of the adopter.

As regards the **second point** :

In the Code Napoléon, adoption and its legal effects are regulated by art. 343 ss. (3) ; and it is clear from these provisions that the civil law here recognises a true adoption, not indeed perfect, but imperfect. For, if in virtue of art. 348, the adopted does not pass into the family and under the power of the adopter (4), nevertheless the adopter holds the place of parent in respect of the adopted and gives him his name (5) ; on the other hand, in

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1. See also tit. 11, § 8 and 9, which explicitly recognises in the two kinds of adoption the effect of establishing a sort of paternity and filiation.

2. Besides, as De Becker remarks (o. c., p. 212), if Justinian did not ordain that, as a general rule, simple adoption should put the adopted under the power of the adopter, it was not that he wished to relax the intimate union that exists between such persons ; what he had in view was solely the welfare of the adopted. He wished to provide, in the case in which the adoptive father declared the adopted emancipated and deprived of his inheritance, that he should not be at the same time robbed of his own paternal property.

3. On the introduction of adoption into the Code Civil, after its long disappearance from our usage and law, see Planiol, o. c., I, nº 1570.

4. L'adopté restera dans sa famille naturelle, et y conservera tous ses droits ».

5. See art. 347, 349 and 350. On the discussions that took place in the Council of State concerning the effects of adoption, see Planiol, o. c., I, nº 1598.

accordance with art. 353, adoption does not come into being by a simply private act, but requires judicial action and the intervention of a judge, and even of a superior judge (1).

From this inquiry it accordingly follows that the canonical impediment of legal relationship is contracted by adoption, such as is recognised by our (Belgian) civil law.

This conclusion is strongly confirmed by the reply of the S. Poenitentiaria, of 17 March 1826 (2) and by the decree of the C. S. O., of 23 Feb. 1853 (3).

These two documents decide in the affirmative the doubt as to the invalidating power, from the canonical point of view, of adoption as regulated by the Code Napoléon and by the Neapolitan code, which in this matter follows the French (4).

II. **Scope of this impediment.**

321. Extent of this impediment.

There is an impediment :

1. of *quasi-paternity* between the adopter on the one part, and the adopted together with his descendants, who were under his power at the time of adoption, on the other part ;

2. of *quasi-fraternity* between the adopted and the natural and legitimate children of the adopter ;

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1. Napoleon had proposed yet more solemn formalities, as PLANIOL remarks, o. c., I, nº 1591.

2. To the question : « Since, in the *kingdom of France*, the law of adoption has been legally recognised, is there also necessarily a canonical diriment impediment of adoption ? », the S. Congr. replied : « *Affirmatively*, if it is a question of adoption legally constituted ». In the case, this condition is to be understood of adoption legally constituted according to the law of France, with which alone we are here concerned ; it would be arbitrary to understand it of perfect adoption effected according to the provisions of the Roman law.

3. To the question : « Does adoption effected in accordance with the prescribed forms of the civil code of the kingdom of Naples produce the canonical impediment of legal relationship invalidating marriage ? », the S. Congr. replied: « affirmatively ». Now, we must admit, says GASPARRI, o. c., I, nº 765, « that the adoption, of the Neapolitan code, is like that of the French code ; and in particular, according to art. 272, the adopted remains in his natural family ».

4. These decrees confirm not only our conclusion but also the premiss of our first point. For, since they decide that adoption under the French and Neapolitan civil codes, which is only an *incomplete* adoption, constitutes a canonical impediment, they thereby declare that *imperfect* Roman adoption equally involved an impediment before the Roman law, seeing that the canonical impediment is taken from that Law.

3. of *quasi-affinity* between the adopted and the wife of the adopter, as well as between the adopter and the wife of the adopted.

Observe, however, the following difference : the impediment of quasi-paternity and that of quasi-affinity are perpetual, and continue to exist even after the emancipation of the person adopted, while that of quasi-fraternity lapses when the adopted or the adopter's own children are emancipated (1).

322. *Practical conclusion.*

Practical conclusion. We are of opinion that, in Belgium, the existence of the canonical impediment of *legal relationship* must be admitted, within the limits laid down by the Church, but not by the civil code (2).

Nevertheless, in view of the keen controversy on the point, and of the different decision arrived at by theologians of weight, we would not venture to impose our opinion as certain and to deny all probability to the contrary opinion. Thus, in practice, the following rule should be followed :

a) As regards a marriage already *contracted* within the degrees of adoption prohibited by the Church, whatever the theory may be, in view of the existing controversy, one cannot, in practice, declare it null or dissolve it, without having recourse to the Holy See.

b) Before a marriage that is *to be contracted*, if it is discovered that there is between the parties an impediment of adoption within the limits named, it would be necessary to ask for a dispensation, at least as a precaution ; nevertheless, we would not condemn the parish priest, who, relying on the doubt of ecclesiastical law, permitted the celebration of the marriage without a dispensation, especially in those cases in which it would not be easy to apply for one, in accordance with the principles established above in n° 240.

Note. 1. Even if our opinion is followed, there will rarely be occasion to ask for a dispensation ; for, on the one hand, in virtue of art. 343, the adopter must be over fifty years of age before he can adopt anyone at all, and he must be at least fifteen years older than the person adopted ; whence the case of marriage between the adopted and the adopter and their respective spouses is not very likely to occur. On the other hand, the impediment of quasi-fraternity disappears on emancipation.

2. The *canonical* impediment of legal relationship affects the *unbaptized* only *indirectly*, i. e., by reason of the baptized party being subject to it,and,

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1. See Benedict XIV, l. c., n° 4 ; § 2, *Instit.*, I, 10.

2. Thus the civil code, art. 348, sets up the impediment not only between the person adopted and the adopter's own children, but also, in opposition to the canon law, between the various adoptive children of the same person ; yet other differences are enumerated in the *N. R. th.*, I, p. 15.

probably also, in that legal relationship, contracted in a state of infidelity, becomes an impediment to a marriage that is to be contracted after Baptism (1). They are, however, directly subject to the *civil* law invalidating marriage in the case of adoption.

Article 11. The Impediment of Crime.

323. Definition of the impediment of crime; its various kinds.

Preliminary notions. The impediment of crime, which, by the ecclesiastical law, invalidates marriage, arises 1. from adultery accompanied by a promise of marriage or by an attempted marriage; 2. from the murder of one of the married parties with the participation or joint contrivance of the two interested parties; 3. from adultery complicated with conjugicide committed by one of the parties only.

This law of the Church has been made for several reasons; namely, on account of public decency, which calls for the annulling of such scandalous marriages; for the security of married people, which demands that accomplices should be deprived of all hope of marriage that might serve as an incitement to crime; finally, on account of the offence itself, which cries for punishment.

It is quite clear that these reasons are based on the natural law; nevertheless, they are not so forcible that we can say the natural law itself annuls marriage between accomplices, still they afford the Church sufficient ground for setting up a diriment impediment;

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1. It may be objected that the bond arising from adoption is a purely intentional and legal bond, like that of public decency, and not a physical bond binding the person himself, like affinity; and that consequently the case is the same with legal relationship as with public decency, namely, that the bond contracted in a state of infidelity does not become an impediment to a marriage that is to be contracted after Baptism. But, as we have said in n° 222, in the case of public decency, not only the impediment, but the very bond in its entirety, is dependent on the *Church's institution*, and consequently it is quite logical that it should not be contracted by the unbaptized; it cannot, therefore, subsequently revive, or become an impediment. On the contrary, the bond of legal relationship is contracted by legal adoption, in virtue of the civil law, and, as a consequence, it exists also among the unbaptized. It spontaneously entails a canonical impediment when once Baptism has made the convert subject to the law of the Church, before which adoption invalidates marriage.

this impediment is, therefore, *of the ecclesiastical law only* (1). We will now explain more fully the three kinds of impediment of crime.

324. This impediment arises: 1° from adultery

I. *The impediment of crime arising* **from adultery accompanied by a promise of marriage or by an attempted marriage.** That there may be an impediment on this ground, it is necessary :

1. That the **adultery** should be :

a/ *Real* and *material*, that is to say, that the one or the other of the accomplices be bound by a marriage valid and undissolved, though not necessarily consummated.

b/ That it should be *formal* on the part of *both* of the accomplices ; *both* must have knowledge of the marriage of one of the parties ; furthermore, both must be acquainted with *the same marriage*, so that the adultery is, on one side and the other, formally injurious in respect of the *same* married person (2). Accordingly, ignorance of the marriage bars the impediment, provided the ignorance is not affected.

c/ That it should be *consummated*, in other words, effected in such a way as to be fitted for generation ; consequently an act of sodomy or of onanism does not suffice, according to what has been stated in n° 302.

with a promise of marriage

2. Moreover, **the promise of marriage** (and not the mere intention) must be :

a/ Internally *serious* and externally *manifested*.

b/ *Accepted* by the other party, and even, more probably, *mutual*, that is to say, the other party must in turn make the like promise (3) : this reciprocal engagement, however, is in most cases implicitly comprised in the acceptance of the promise made by the other accomplice.

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1. The principal legal sources are : c. 4, C. XXXI, 1 ; c. 3, 4, 5, 6, 8, X, IV, 7, and c. 1, X, III, 33.

2. Therefore, if both the accomplices are married, it is not enough that each of them should have knowledge of his or her own marriage.

3. We may quote in support of this opinion c. 1, *Comp.* III, IV, 6, (= 6, X, IV, 7), in which Innocent III says on the subject of the promise required : « unless... during the lifetime of the other party, *they have promised to marry* » ; likewise the text of the *Formula* of the Dataria, of 1901, 36ª and 37ª : « *if they have mutually promised* to marry after the death of the petitioner's husband ». See Pejska, *Das Rückversprechen...*, in the *Zeitschr. f. k. Th.*, 1902, p. 131 ss.

c/ *Absolute*, or, if conditional, equivalent to an absolute promise, owing to the realisation of the condition.

d/ Made absolutely *before the partner's death*, to take effect *subsequently to the said partner's death*. A promise of attempting marriage before the partner's death is less likely, of its nature, to urge the accomplices on to crime (1).

e/ *Materially and formally injurious* in respect of an existing marriage ; for otherwise the promise does not constitute an element of crime, or qualify the act of adultery ; hence one cannot apply to it the reasons of the invalidating law enumerated in n° 323.

For the promise to be *formally* injurious, it is necessary that both the parties should have *knowledge of the existence of the same marriage* (2) ; for it to be also *materially* injurious, it is necessary to suppose that the still living partner does not consent to it (3).

or an attempted marriage,

3. If it is a question of an **attempted marriage**, this, like the promise, must take place *before the partner's death*, and *with knowledge of the same marriage*, according to what we have just said.

By an attempted marriage is understood a marriage invalidly contracted « by words expressing present consent, or by some other sign involving a promise of consent » (4). Publicity or clandestinity make no difference here, and even what is known as a civil marriage suffices (5), but not simple concubinage practised without the least matrimonial consent (5).

1. Cf. also the text of the formula of the Dataria, cited above.

2. Moreover, in accordance with what we shall say presently, the promise must be joined, during the existence of the same marriage, with a formal act of adultery. Therefore, the promise supposes knowledge of the marriage, if it is made after the sexual intercourse ; if it precedes such intercourse, and has really been made in ignorance of the conjugal bond, generally it will be implicitly renewed and confirmed in the very act of adultery afterwards committed with knowledge of the matter. Thus, this question has hardly any practical importance. See, however, Van de Burgt-Schaepman, o. c., I, n° 138.

3. Quite recently the following case occurred in the diocese of Bruges : a man had committed adultery with his wife's sister ; later, in the presence of his dying wife, he promised his accomplice marriage ; but not only did his wife permit this, but even strongly urged him to do so for the sake of the children.

4. Decree of the S. C. de P. F., 14 Jan. 1844, in Gasparri, o. c., I, n° 649.

5. According to the decree of the S. C. de Sacr., 3 June 1912, in the *A. A. S.*, IV, p. 403. See also De Angelis, o. c., Book IV, tit. IV, n° 11, at the end. He appeals to the practice of the S. Poenitentiaria, which admits the existence of the impediment of crime resulting from adultery joined with civil marriage.

5. See the decree of 1844, l. c.

during the same marriage ;

4. Finally, it is necessary that the adultery should be joined with the promise or attempted marriage, in such a way that they both take place, with all the requisite conditions, *during the existence of the violated marriage ;* but it makes no difference whether the promise of,or the attempt at marriage was made before or after the adultery occurred.Accordingly, there would be no impediment if the promise or attempt were withdrawn, and not renewed before the act of adultery was committed (1) ; neither would there be one, if the promise or attempt took place during the lifetime of a first partner, and the adultery during that of a second, or vice versa.

325. 2° from conjugicide consequent on the act of the accomplices

II. *The impediment of crime arising* from conjugicide alone.

That an impediment may exist on this ground, it is necessary :

1. That it should be a question of a *real husband or wife*, i. e., of one whose marriage was valid, even though not consummated.

2.That the death *should be really the result of the act and contrivance of the two accomplices.* The death must be an effect that can be ascribed to both, whether they have been the physical cause of it, or merely the moral cause, by commanding or counselling the murder. Thus it is not enough that one only of the parties should be the murderer, without the effective co-operation of the other, even though this latter approved of the murder *after it had been committed* (2); in like manner, there is no impediment if death is not the result of the act of the accomplices, but of unskilful treatment on the part of the doctor, e. g., in the case of a wound that is not in itself mortal. It is also necessary that both the accomplices should have conspired together and instigated the death of the partner *by common accord ;* and it is not sufficient that they should have acted separately and independently of one another, for then they would not be *accomplices.*

by common accord ;

3. It is necessary that the murder should have been committed *with the intention, at least on the part of one of the culprits, of marrying the accomplice.* This condition is a consequence of the object of

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1. If the promise of, or attempt at marriage is withdrawn only after the adultery, the impediment does not lapse, since its constituent elements were united, even though during a very brief period only.

2. It makes no difference if there were many co-operators and accomplices in the murder of the partner, provided the person whom the murderer intends to marry had no hand in it.

the law, which is to prevent the killing of a partner in the hope of marrying another, and the outraging of public decency by a marriage brought about at the cost of so great a crime.

It does not seem requisite that both the accomplices should have this intention, at least in the case in which the one who really has it, has made it known to the other (1). Nevertheless, in the external forum, it is presumed that this intention existed on either side, or, at least. that the intention was made known by the one to the other, whenever it is proved that there had been a conspiring together with a view to murder, and an attempt at marriage followed. In the internal forum, this intention or the manifestation of the same is sufficiently inferred from love-letters and the like preceding the murder.

326.

III. *The impediment of crime arising* **from adultery joined with murder of partner.** *3° from adultery joined*

To incur this third kind of impediment of crime, it is necessary :

1. That the **act of adultery** should have the conditions enumerated under I.

2. That the **murder** be that of a real husband or wife, and that it be real also both in the matter of cause and of effect, according to what we have said under II (i. e., that the death really result from the plotting itself), and that it be inflicted with a view to marriage, as we have stated above. *with conjugicide perpetrated by one of the parties,*

It is sufficient, here, that the murder be the act of one only of the parties, and it does not seem requisite that the murderer should have made known to his accomplice his intention of marrying her.

3. The adultery must **be joined** with the conjugicide *during the existence of one and the same marriage ;* but it does not matter whether it precedes the murder, as is almost always the case, or follows the fatal act, before the death of the victim, e. g., between the taking of the poison and the occurrence of death. *during the same marriage.*

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1. See Gasparri, o. c., I, n° 644 ; Feye, *De Imp.*. n° 453 ; Theol. Mechl., o. c. ; n° 83 ; Wernz, o. c., n° 538, note 55 ; De Becker, *De Matr.*, p. 180 s. ; Van De Burgt-Schaepman, o. c., I, n° 145.

Note. 1. The impediment of crime may prove *multiplex* in two ways :

327. How this impediment becomes multiplex.

a/ When the different kinds of the impediment are verified at the same time in respect of *one and the same marriage ;* thus, if to the same adultery there are added successively the promise of marriage, the attempt at marriage, and conjugicide, there results a threefold impediment. and even a fourfold one, in our opinion, when the murder has been committed through the conspiring of the two culprits. We have maintained this opinion in the *Collat. Brug.*, t. XII, p. 402.

b/ When the constituent elements of the impediment exist in respect of *two marriages,* for example, when both of the accomplices are married and each of them has knowledge of the marriage of the other.

Should it happen that the two causes of multiplicity occur in the same case, i. e., if several kinds of the impediment of crime are verified in respect of two marriages, the impediment might exist four, six, and even eight times.

Practical observations.

2. The *parish priest* and especially the *confessor* must give their special attention to the impediment of crime, particularly to the impediment arising from adultery joined with attempted marriage or the promise of marriage, and they must act in this matter with the greatest prudence. Obviously all persons about to marry are not to be questioned indiscriminately on this subject, but only those against whom there may be some ground for suspicion, for example, a man who, shortly after the death of his wife, wants to marry his servant or some other person with whom he is known to have lived on terms of familiarity, especially if the wife's illness was a lengthened one, or she did not possess her husband's love. Such questioning must be made with prudence and in general terms, according to the condition of the persons ; it is necessary to avoid giving offence to the parties concerned, but at the same time there is need of shrewdness to discover a possible impediment.

In our days, the impediment of crime may often exist in the case of those who have been civilly divorced ; for example, it is sufficient if a husband, divorced from his wife, contracts a fresh civil marriage with a woman whom he subsequently desires to

marry before the Church, after the death of his lawful wife (1).

The confessor must also bear in mind that, in many dioceses, crime is a *reserved case* (2).

328. *This impediment binds even those who are ignorant of its existence,*

Corollary I. What has gone before enables us to solve the question of whether the impediment of crime may be contracted by those whose who are *ignorant* of its existence (3).

Evidently, if the sole or principal object of the invalidating law was to inflict a penalty for the offence, as it is a question here of an extraordinary punishment of exceptional gravity, it would not be incurred by those who are ignorant of it ; but, as matters stand, it seems rather that the impediment has been established for the general good, to safeguard public decency, as we have seen, and to ensure the security of married persons (4).

In our opinion, then, ignorance does not prevent one from con-

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1. See, for example, the case proposed in the *Collat. Brug.*, t. V, p. 606 s., and other similar cases.

2. Thus, in the diocese of Bruges, « *Adultery* is a case reserved to the Bishop, *whenever it constitutes an impediment of crime invalidating marriage* » (*Libellus*, p. 42) ; moreover, « homicide directly voluntary » is also reserved (*Ibid.*, p. 31). Therefore, whenever adultery is joined with a promise of marriage, or with an attempted marriage, or with conjugicide, it becomes a reserved case ; there may even be two concurrently, one on the ground of qualified adultery, and another on the ground of homicide.

That there may be a reserved case on the ground of adultery, it is necessary that it should possess all the conditions enumerated above, under I and III, i. e., all those that are certainly or probably required to constitute a diriment impediment ; especially is it necessary that the promise of marriage or the attempt at marriage should have been made with full knowledge of the existence of the marriage bond and during the continuance of the same.

There is a special difficulty as to the case of adultery joined with conjugicide : does the party who has not participated in the murder in any way, also incur the reservation ? We may answer that the party named does not incur it, unless the same has had full knowledge of the other's designs, as stated in the *Collat. Brug.*, t. VII, p. 551 s.

3. This controversy concerns the internal forum alone, for in the external forum, knowledge of the impediment is presumed.

4. « It is true that the accomplices, ignorant of this impediment, were not to be deterred from crime by this consideration ; but it is here a question of defending conjugal fidelity and the security of the innocent partner in other marriages ; and it is necessary to let Christians know, by examples, that such crimes do not benefit their authors ». De Becker, o. c., p. 176.

tracting the impediment of crime, and consequently, we would not venture to regard the impediment, unknown to the guilty parties, as doubtful with a doubt of law, in such a way that the Church would supply in a prospective marriage. Nevertheless, in view of the authority of those writers who maintain the contrary opinion, it would not be right, without having recourse to the Holy See, to declare null such a marriage already contracted, in case of ignorance of the impediment of crime (1).

but it does not directly bind the unbaptized ;

Corollary II. As the impediment of which we are speaking is of the *ecclesiastical* law only, the *unbaptized* are subject to it only *indirectly*, according to what has been said in n° 222. There are two observations to be made on this point : a/ That the baptized party may communicate to the unbaptized his own inability on the ground of crime, it is necessary that the baptized party himself should have committed the offence under the conditions required for contracting the impediment. This would not be the case if, e. g., he had been guilty of the act of adultery only, and the murder had been committed by the prospective unbaptized partner alone ; for adultery alone is not enough to constitute the impediment. b/ In conformity with the explanation given in n° 222, a crime committed before baptism does not acquire an invalidating force in respect of marriage to be contracted after conversion ; not even if the conversion took place, e. g., after the adultery and before the promise of marriage, or the attempt at marriage, or the murder (2).

a dispensation from it can be obtained.

Corollary III. Since this impediment is of the ecclesiastical law only, it follows that the Church *can dispense from it*. As regards the *use* of this power, in cases of crime without any attempt on the life of the partner, it is not very difficult to obtain a dispensation, and the Bishops of Belgium in general have the delegated power of granting it, in virtue of their Quinquennial Faculties from the S. C. de P. F., and of the *Pagella* of the S. Poenitentiaria,

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1. See the *Collat. Brug.*, t. X, p. 612 s., where a practical application of this doctrine is made ; see also t. VII, p. 552, and above, n° 238.

2. It would be otherwise if the promise of marriage anterior to baptism were confirmed after baptism and accompanied by adultery ; then the entire crime constituting the impediment would be considered as posterior to baptism.

as we shall point out when treating of dispensations (1). But when the impediment arises from *conjugicide*, very grave reasons are required ; and, if the murder is a matter *of public knowledge*, it is extremely rarely, apart from the danger of death (2), that the removal of the impediment can be hoped for (3).

Scholion I. Historical development.

329. Historical notice.

Adultery, in ancient times, was regarded as an impediment *prohibiting* marriage with any person whatever (c. 22, C.XXXII, qu. 7) ; several texts (C. XXXI, qu. 1 ; c. 1, X, IV, 7) treat this early prohibition as concerning the marriage of the two guilty parties with one another. But it does not seem that adultery *alone* was a *diriment* impediment, even to marriage between accomplices ; and, in the sequel, it ceased to be even a prohibiting impediment.

It was otherwise with *qualified* adultery : c. 4, C. XXXI, 1, quotes a canon of the Concil. Triburien. (895), which sets up a *diriment* impediment, as it appears, on account of adultery joined with a promise of marriage. Gratian, in the *Dictum* on c. 3, *ibidem*, makes mention of an impediment arising from adultery joined with a promise to marry after the death of the other partner, or complicated with participation in conjugicide. See also Alexander III, c 3, X, IV, 7. Thus *two* kinds of impediment of crime were admitted : the first, resulting from adultery joined with participation in the murder of the partner ; the second, resulting from adultery with a promise of marriage. An attempt to marry during the lifetime of the partner was considered as at least equivalent to such a promise, as is proved by cc. 4 and 5, X, IV, 7. Later, Celestine III, c. 1, X, III, 33, established a *third* kind of impediment arising from the plottings between the two accomplices. Finally, Gregory IX, c. 8, X, IV, 7, declared that the promise of

1. By the decree of the S. C. de Sacr., 3 June 1912 (*A. A. S.* IV, p. 403), it is decreed « that for the future a dispensation from the said impediment arising from adultery with attempted civil marriage shall be considered as granted in the case (although not asked for), either by a dispensation granted by the Holy See from marriage ratum non consummatum, or by permission to marry again ». Cf. *N. R. th.*, 1912, p. 645-652.

2. The impediment of crime arising from conjugicide, even when public, is not excepted from the faculties granted in 1888 in favour of dying concubinarii.

3. Many authors state that a dispensation is never granted in this case, except in danger of death ; but De Becker, o. c., p. 182 s., quotes a papal indult permitting dispensation, outside of the case of danger of death, « for marriages already *contracted*, in cases both *public* and occult... from the impediment of crime brought about by the contrivance of one or of both of the contracting parties ».

marriage alone, without adultery during the lifetime of the partner, did not constitute a diriment impediment (1). See on this subject ESMEIN, o. c., I, p. 384-390.

Besides the *diriment* impediment of crime, such as it exists at the present day, arising from the three causes which we have explained, there existed formerly various prohibitions and *prohibitive* impediments in punishment of *other crimes*; these were *absolute* impediments, prohibiting marriage with *any person whatever*. Above, in n° 242, we have enumerated offences of this kind, namely, incest, murder of a priest, attempted marriage with a nun, and attempt on the life of a partner (without adultery or plotting); c. 1, X, IV, 19 is explicit on this subject.

Penalties. **Scholion II.** Persons guilty of crime were liable to various **penalties**, particularly to those provided against polygamists, where there was an attempt at marriage (see the *Collat. Brug.*, t. V, p. 606, and above, n° 283) (2).

Civil law. **Scholion III. Civil legislation.** The Code Napoléon, art. 294, decrees, under the form of a *prohibitive* impediment, that « dans le cas de divorce admis en justice pour cause d'adultère, l'époux coupable ne pourra jamais se marier avec son complice » (3). Another provision, that calls for mention here (cf. n° 243), enacts that a dispensation from affinity cannot be obtained

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1. « If one, during the lifetime of his wife, has promised to marry another, or if, in fact, he has been united with her, but has not known her either before or after such union, during the life of his lawful wife..., there is no ground for invalidating the marriage that he has contracted with this woman after the death of his wife. But such marriage could not be tolerated, if before or after (his promise or illicit union), he had committed adultery, during the lifetime of his lawful wife ».

2. We should mention also the reservation existing in the diocese of Bruges, as noted above.

3. See above, n^{os} 243 and 207; in the latter, we have noted that this prohibition has been abrogated in France. This provision is in conformity with the *Novellae* of Justinian, 134, c. 12. For further particulars as to these provisions of the Roman Law, see ESMEIN, l. c., p. 384. With many ancient peoples the impediment of adultery had no *raison d'être*, as the guilty woman was put to death. It was thus with the Germans, the Hebrews and others. According to the law of *Hammurabi*, the adulterous husband was equally liable to the punishment of death; in paragr. 129 we read : « If a man's wife be found lying with another male, they shall be bound and cast into the water »; in the same law, paragr. 153, the penalty of death is enacted against a wife who plots the death of her husband : « If a man's wife, with a view to another male, has contrived her husband's death, that woman shall be hanged ».

when the deceased partner died a *violent* death ; for then it is presumed that there has been complicity between the survivor and the affine whom the same wishes to marry.

Third Series

THE DIRIMENT IMPEDIMENT DUE TO THE ABSENCE OF THE REQUIRED FORMALITIES.

(A Reference).

N. B. According to the order indicated in n° 242, this would be the proper place for treating of the impediment of *clandestinity*. But as we have already dealt exhaustively with that matter in number 63 and the following numbers, we refer the reader to what has been said there.

Appendix I.

DUTIES OF THE PARISH PRIEST AND CONFESSOR.

We have no intention of explaining here all the duties that devolve on the parish priest or confessor in relation to marriage. Many points, such as assistance at a mixed marriage, or at the marriage of an unworthy person, and the way in which the confessor should deal with married people given to the practice of onanism, have been explained already ; and there are other points that will find a more fitting place in the treatise on dispensations.

We confine ourselves for the present to some general observations on the *examination of those about to marry*, on the *instruction to be given to the same and to the newly married* (1), and on the duty of the parish priest with regard to the *entries to be made in the register*.

1. See the works on this subject mentioned in the Bibliography.

Paragraph I. EXAMINATION OF THOSE ABOUT TO MARRY.

I. Examination to be made by the parish priest.

330. Examination to be made by the parish priest:

When a marriage is in contemplation, the parish priest must make a *twofold* inquiry : a *private* (1) examination as to the possible existence of impediments, and as to the religious knowledge of the prospective husband and wife ; and a *juridical* examination into the free state of the parties, or absence of impediments.

A. Juridical Examination.

1° juridical examination as to free state ;

According to the strict letter of the decrees, it would be necessary to make, for every marriage, a juridical inquiry into the *free state* or absence of impediments, especially of that of a former and existing marriage (ligamen) (2). It would, accordingly, be necessary either to procure a proper certificate, or to receive the depositions of credible witnesses, or to provide oneself with other legitimate and sufficient proofs for acquiring certainty. This is what the Roman Instructions prescribe,among which we ought to mention in particular the Instruction of the C. S. O., approved by Clement X, 21 Aug. 1670 (3), and confirmed by two Instructions of the C. S. O., that of 22 Aug 1890 (4), concerning the examination to which the witnesses are to be subjected, and that of 1868, regarding the proof of death of the former husband or wife (5). The rule to be followed is this. For every marriage there is required the declaration of witnesses as to the free state of each of the intending parties, sworn before the Ordinary or his delegate ; the delegate must lay the said declaration before the Ordinary, to whom it belongs to authorise the publishing of the banns and the celebration of the marriage.

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1. Benedict XIV, *Nimiam Licentiam*, § 10 : « Likewise, it is incumbent on their own parish priest, before publishing the banns of marriage, to question the man and the woman with prudence, and, as they say, *ad aurem* (i. e., without witnesses) ».

2. Instr. of the C. S. O., 1 Febr. 1865, ad 1m, in the *N. R. th.*, XXXI, p. 189.

3. *Collectan.* of the S. C. de P. F., n° 1363.

4. *Ibid.*, n° 1376.

5. *Ibid.*, n° 1372. See also the documents cited in n°s 1366, 1373, 1374; *Canon. Contemp.*. 1902, p. 624 s., and *N. R. th.*, XXXI, p. 189 . Cf. also *Instructions du Vicariat de Rome*, l. c., p. 598 s. ; Standaert, in the *Collat. Gandav.*, V, p.58 ss.

But *in practice*, at least in our countries, this juridical inquiry is ordinarily omitted in the case of intending parties *within the diocese, having a fixed domicile, and not having dwelt elsewhere for any considerable time, since reaching the age of puberty*. For them, the private examination by the parish priest and the publication of the banns are considered to furnish sufficient guarantee of their free state. In the case of *others*, too, the letter of the law is but rarely observed, except when dealing with *those who lead a vagrant life (vagi), soldiers, or other persons in whose regard there is special reason to doubt* (1).

The following are *the requirements of law for juridically proving freedom to marry*, and, in particular, *the death of a former husband or wife*, on which the juridical inquiry ought especially to turn :

1. « Every effort must be made by all means to procure a *certificate*, extracted from the registers of the parish, hospital or army (2); if that cannot be obtained from the ecclesiastical authorities, application for it must be made to the civil authorities of the place in which the person is supposed to have died » (3).

2. In default of a certificate, its place must be supplied by the *depositions of two witnesses* worthy of credit, who certify on oath that they were personally acquainted with the deceased, and who are at agreement with one another as to the place and cause of death and all other essential particulars (4). They are to be interrogated according to the formula given in the Instructions of 1670 and 1890.

In default of two witnesses, the evidence of *one alone* may suffice,

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1. For the extent to which this practice may be justified, see the *Collat. Brug.*, III, p. 239 ; De Becker, *De Matr.*, p. 289 s. ; *Collat. Namurc.*, 1904, p. 84 ; *R. th. fr.*, 1901, p. 92 ; Boudinhon, *Mariage et Fiançailles*, n° 72 ; Standaert, in *Collat. Gandav.*, V, p. 59 ss. Cf. also the decr. S. C. C., 11 Feb. 1908, ad 9m.

2. If the decease (of the former partner) took place in another diocese, it is necessary to require that the evidence of the parish priest or rector be examined by the Ordinary of that place, and authenticated by him, except in the case in which one is otherwise satisfied as to the reliability of the evidence ; when it is a question of a very distant and unknown locality, one must see that the signature has been given, not only by the Ordinary of the place of decease, but also by the Ordinary of the parish in which the marriage is to take place.

3. Instruct. of 1868, under 2/.

4. Ibid., n° 3.

« provided that such witness possesses the qualifications named, that he is quite unexceptionable, and that his depositions are supported by other solid proofs » ; provided, moreover, that his evidence contains nothing that is inconsistent and improbable (1).

3. In default of any witness, « every possible *surmise, clue and circumstance* must be made use of for obtaining proof of death, with the greatest care and prudence ; so that when all available information has been collected and duly weighed..., a prudent man may be in a position to affirm with very great probability or moral certainty that the death occurred » (2).

4. « *Common report,* supported by other circumstances, also constitutes an argument in favour of decease, but on the following conditions : it must be supported, on oath, by at least two credible witnesses who are in a position to give a probable foundation for such rumours ; it will be for them to say if the greater and more responsible part of the people gives credence to the rumours, and if they do so themselves ; moreover, there must be no suspicion that the report has been spread by those in whose interest the inquiry is made (3).

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1. *Ibid.*, nº 4.

2. Conjectures to be made in such cases are indicated in the same Instruction of 1868 ; e. g., « Did the person, of whose death there is question, lead a good, pious and religious life, and did he love his wife ? Had he any motive for disappearing ?... Has he expatriated himself with the consent of his wife and relations ? What were his age and state of health at the time ?.... Has he taken part in any battle ? been captured by the enemy ? deserted ? placed in a position of great danger ? etc. ». See also the Instr. of the C. S. O., 25 July 1898, concerning Italian soldiers who took part in the battle of Adowa, (*N. R. th.*, XXXI, p. 92 ss.)and the solution of the *Causa* laid before the S. C. C., 18 July 1900 (*R. th. fr.* 1901, p. 81 ss.), as well as the twofold solution of the case proposed to the S. C. de Sacr., 22 Jan.1909 and 26 March 1909, (*Collat. Brug.*,t. XIV,p.614 s.). Consult also the reply of the S. C. de Sacr., 16 Dec. 1910, with regard to a woman whose husband had been at the battle of Mukden, in the Russo-Japanese war (*A. A. S.* 1911, p. 26 ss.). With regard to inhabitants of Sicily and Calabria, who were supposed to have perished in the in the carthquake, and of whose death civil documentary evidence existed, the S. C. de Sacr. decided that the cases were to be examined individually. Cf. *A. A. S.*, II, p. 196 ss.

3. « It is not enough that there should be a vague rumour of death or prolonged absence of the partner, or probable evidence of his death » ; but there must be « such conclusions *(conjecturae)* in favour of the death as to afford a prudent

5. If it is impossible to make use of these means of investigation, or if they do not lead to moral certainty, recourse must be had, as a last resource, to the *suppletory oath*.

The Pope ordinarily grants Bishops, by Indult (1), the power of offering this oath to *those of no fixed abode (vagi)* (2) and *soldiers*; but they cannot tender it to others, without a special faculty, except perhaps in a case of urgency, when a Bishop might do it in virtue of his ordinary powers (3).

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mean a moral certainty of it ». Instr. of the S. C. de P. F., 1792, l. c. Moreover, of themselves, « the precautions taken by the civil law in the case of absence of husband or wife, cannot take the place of moral certainty of death ». Instr. of the C. S. O., 22 June 1865, in the *Collectan.*, nº 1373.

1. The Bishop of Bruges obtained such an indult on the 28 June 1897 (*Collat. Brug.*, t. III, p. 238).

2. In the use of this indult, those can be considered as *vagi* « who, without being *vagi* properly so called, have sojourned in different places, and affirm that they are unable to call witnesses to attest their free state »; in this case, then, they can be permitted to take the suppletory oath « in respect of those places for which evidence cannot be obtained....., provided that their stay in each of them has not exceeded one year ». Instr. of 1 Feb. 1865, ad 2^m (*N. R. th.*, XXXI, p. 189).

3. The formalities to be observed in administering the suppletory oath are described in the *Collat. Brug.*, t. III, p. 240 s.

The petitioner, in the presence of two witnesses, having on (or her) right hand on the book of the Gospels, kneeling before a crucifix placed between two lighted candles, shall make oath in the following or like terms:

« *I, N..., swear before God that I am not bound in any bond of marriage; that I have not promised marriage to anyone, save to N..., whom I intend to marry, and that, to the best of my knowledge, there exists between us two no impediment to marriage. So help me God and these his Holy Gospels* ».

But before the petitioner makes oath, the parish priest will admonish him (or her) of the gravity of the act he or she is about to perform, and will inform him of the *nullity* of a marriage contracted under a diriment impediment. Moreover, in accordance with the orders of the Holy Office, he will inform the same of the ecclesiastical penalties, whether spiritual, as legal infamy, excommunication etc., or temporal, enacted against polygamists by the holy Canons and Apostolic Constitutions. These temporal penalties now fallen into desuetude, but never repealed, are well calculated to inspire a horror of the crime of bigamy. Originally, these penalties were *public penance for a term of seven years together with a fast of forty days on bread and water*; at a later period, in accordance with a decision of the Congregation of the Holy Office, polygamists were

Where the Bishop cannot proceed to the administration of the suppletory oath, or where, notwithstanding the oath, he is unable to arrive at certainty, recourse must be had to the Holy See (1).

331. 2° private examination :

B. **Private examination** (2).

1. **As to the religious knowledge of the intending parties.**

a/ as to religious knowledge,

« At a meeting held in the presence of Innocent XII, in 1697, it was decreed that parish priests should not publish a marriage in church, without having previously ascertained that the intending parties are *sufficiently instructed in the rudiments of the Christian religion,* and this decree was confirmed by Clement XI ». These are the precise terms of BENEDICT XIV, *De Synod. Dioeces.*, l. VIII, c. 14, n° 3, who absolutely forbids the admission to marriage of any person whatever who is not sufficiently instructed in religious knowledge (3).

In like manner, the *Rituale Romanum,* tit. VIII, c. 1, n° 1, requires that « both (the intending parties) *should know the essential points of faith* » (4). And it goes on to say that it is certainly necessary for them to know them, since it will be their duty to

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condemned to five years penal servitude *(ad triremes)*, if they had not called false witnesses to testify to their free state, and to seven years' in the other event. See above, n° 283.

The parish priest will not omit to send to the Bishop an account of the proceedings, duly signed by the intending party, by himself and by the two witnesses.

1. Whenever the Holy See gives a certificate of freedom to marry on account of the presumed death of the partner, or when permission is granted, in a case, to marry again, it is understood that a dispensation is given from the impediment of crime arising from adultery and attempted marriage. See above, n° 328.

2. See HORTMANNS, *Das Brautexamen,* Köln, 1907 ; HÖTZLE, *Das Brautexamen,* Freiburg i. Br., 1907, 2te Auflage.

3. In like manner, the Constit. *Etsi minime* declares that « the marriage cannot be proceeded with, if the parish priest, on questioning the parties in accordance with his duty, discovers the man or the woman is ignorant of the things necessary for salvation ».

4. The *Pastorale Brugense,* p. 121, directs the parish priest « to inquire... if they know the rudiments of faith ; namely, the Lord's Prayer, the Apostles' Creed, the commandments of God and of the Church, besides the other things which they are more expressly bound to know *de necessitate medii et praecepti.* If he finds them quite ignorant, they must be carefully instructed, and he cannot proceed to the publication of the banns until they are sufficiently instructed ».

teach them to their children. Besides, as BENEDICT XIV explains, *De Syn. Dioeces.*, l. c., n° 5, « One who is ignorant of the rudiments of faith, which he is bound by grave precept to know, so long as he does not learn them, when able to do so, remains in a state of mortal sin, and is therefore rightly and deservedly forbidden to contract marriage » ; he must be treated as publicly unworthy, as stated above, in n° 117. If the marriage is to be celebrated elsewhere, it would be necessary to inform the parish priest, before whom they wish to marry, that the intending parties are not properly disposed (1).

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2. As to Impediments. *b/ as to impediments :*

a) *Prohibitive.*

The parish priest must see that there is no impediment arising from *betrothment*. This he will do in accordance with the rules given above, in n° 33 ss. *prohibitive,*

He must also find out, unless already known to him, if the *parents*, still living, are reasonably *opposed* to the marriage, for such opposition constitutes the foundation of the « Church's prohibition ». He must also take into consideration parental consent as required by the civil law, the provisions of which we have given above, in n° 250.

Ordinarily there will be no need to speak of the impediment of vow, unless, for example, the bride has lived a very pious and retired life.

b) *Diriment.*

1/ « It is incumbent on their own parish priest, before the publication of an intended marriage is made in church during the *diriment.*

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1. The same Pope, l. c., n° 6, nevertheless adds an important observation : « It sometimes happens that one knows and believes the principal mysteries of our Faith, and has at least a rudimentary notion of the other points that it is necessary to know because the knowledge of them is a matter of precept, but that he is of so dull an understanding and of so weak a memory, that, in spite of all his efforts, it is impossible for him to learn them by heart and repeat them ». In such a case, he is not to be kept indefinitely from marriage, which was instituted for the requirements of nature, and which consequently must not be forbidden to anyone except through his own fault ; but the parish priest will take care that one, whose memory is so defective, shall frequently hear repeated what he has learnt in a rudimentary way, so that the knowledge acquired may not be altogether lost ». The *Pastorale Brugense*, p. 121, speaks in the same sense.

solemnities of mass..., to question the intending parties and ascertain if they desire to be united *freely and willingly* and with a real internal consent ». BENEDICT XIV, *Nimiam Licentiam*, § 10.

2/ Scarcely ever can one omit giving attention to the impediment of *consanguinity* and of *lawful affinity*, especially if the engaged parties are natives of the same place and members of families that are on friendly terms with one another ; the parish priest is not exonerated from this duty by the simple affirmation of the parties that there is no such connection between them.

Should there be even the slightest suspicion of blood-relationship or affinity, it is not enough for the parish priest to interrogate the parties, but he must himself carefully examine their genealogical tree, especially in places where the inhabitants form a kind of caste apart, and are accustomed to intermarry among themselves. To simplify matters, he will, if possible, interview some elderly member of the family who is well acquainted with the genealogy of the intending parties.

3/ The impediment of *spiritual relationship* is too often overlooked, though it frequently exists when a widower or widow desires to marry one connected by ties of blood-relationship, affinity or friendship (1).

It is also the business of the parish priest to discover the existence of spiritual relationship, when a young man wishes to marry a girl with whom he has previously had illicit relations, and who has had a child that she has baptized in a case of necessity (2) ; as also when the prospective husband has stood as godfather to the illegitimate child of his fiancée. But to avoid this last named trouble, it is usual not to appoint a godfather at the baptism of an illegitimate child, as we have stated in n° 316.

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1. This is why the *Liber Manualis Brugensis* says, p. 199 : « If a dispensation has to be sought from affinity in the first degree of the equal collateral line, one must never omit to make a special inquiry into another impediment, namely, that of spiritual relationship, which does not cease to bind the parties even after the death of the child held at the font ».

2. Thus, quite recently, in a parish in the diocese of Bruges an illegitimate child, two months old, was presented for baptism, when an opportune question brought to light the fact that the child had been already baptized at home by the mother herself, who was on the following day to marry the young man with whom she had sinned.

4/ Another contingency which calls for serious attention, is the impediment of *public decency* arising from a betrothment previously contracted by the prospective husband or wife with a person related to the other party in the first degree. Note that this impediment continues to exist even after the complete dissolution of the betrothment, provided the latter was valid and absolute. The parish priest must be still more on his guard, if he finds that the young man has also been keeping company with the sister or sisters of his intended wife.

5/ At the present time, marriage is less exposed to the danger of nullity on the ground of *clandestinity* than formerly, since it suffices for its validity that it should have been celebrated before the particular parish priest of the place where the marriage took place ; nevertheless, it is always necessary to inform oneself of the domicile of the parties or of their residence for a month in the parish, in order to observe exactly the conditions required for licitness.

6/ In his private inquiry, the parish priest must moreover give his attention to the question of the impediment of a prior and existing marriage *(ligamen)*, whenever a juridical inquiry has not been held.

For the purpose of ascertaining more readily the possible existence of this impediment, the Decree *Ne Temere*, art. IX, par. 2, prescribes that the marriage shall be entered in the baptismal register; in the case in which the contracting parties were baptized in a parish other than that in which the marriage takes place, it further enjoins, as we shall point out in n° 338, that the parish priest of the said parish is to be advised that the marriage has taken place, in order that the prescribed entry may be made. Quite recently, 6 March 1911, the S. C. de Sacr. has added (to 2°), that : « parish priests cannot omit to demand of the contracting parties a certificate of baptism,in the case in which they have been baptized elsewhere » (1).

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1. The Bishop of Bruges had already taken this decision for his diocese at the Prosynodal Meeting of 1908 ; see the *Collat. Brug.*, t. XIII, p. 602, and below, n° 338.

For this to be effective, it is necessary that the certificate of baptism should be *recent* and given *with a view to the marriage*. This is what the Bishop of Metz aimed at, when specifying that the document should not be more than three

7/ *Ordinarily*, persons about to marry ought not to be questioned, out of confession, concerning impediments involving infamy, such as that of *crime* and of *illicit affinity*, except when special circumstances give rise to a suspicion that there has been an offence falling under the external forum. Thus, if a man, who has recently lost his wife, wishes to marry again with a woman, his servant, for instance, with whom he has dwelt during his wife's illness, or with someone with whom he is known to have had familiar relations, the parish priest cannot omit to question the man cautiously as to whether, during the lifetime of his wife, he has committed adultery with the woman he now wishes to marry, and whether he has made her a promise of marriage that has been accepted by her. It may also happen that the dissolute life and sinful familiarities of one of the engaged parties may lay him open to the suspicion of having committed adultery with some relation of the other party in the first or second degree.

Note, however, that, having regard to the nature of the impediments involving infamy and to the condition of the persons, it is necessary to proceed with great discretion in such investigations, and so, for example, as the THEOL. MECHL., o. c., p. 58, directs : « it is advisable, in certain cases, in order to avoid giving offence to the persons concerned, not to put certain impediments before them in the form of a question, as if they were suspected of them, but rather *in the form of instruction*, adding that these are important impediments on which it is usual to instruct those who are about to marry ».

Moreover, the parish priest should always tell the engaged parties, that, in their confession before marriage, they must inform their confessor that they are shortly going to be married.

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months old. See the *Revue ecclés. de Metz*, 1908, p. 303 s. and the *Instructions du Vicariat de Rome*, l. c., p. 597.

According to PLANIOL, o. c., nº 718, the French civil law has established analogous provisions : « Mention of the marriage must be inscribed, with little delay, in the margin of the record of birth of the intending parties. Certificates of birth bear the date of the day on which they are issued, and anyone wishing to marry must produce for the civil officer a certificate of birth of *recent* date, which certificate must not be more than three months old ».

Note : a/ The twofold inquiry of which we have spoken must be made *before proceeding to the publication of the banns ;* if the parties belong to different parishes, the parish priest of the bridegroom will certify in writing that he has examined him, and will forward this certificate to the parish priest of the bride ; this latter, after having examined his own parishioner, will advise the parish priest of the bridegroom that he may safely proceed to the publication of the banns.

b/ The parties must be interrogated *separately*, and care must be taken, as far as possible, to fix on a suitable time and place, not too late in the evening, for example, at least in the case of the bride.

c/ « If the parish priest knows from some other source that the parties are sufficiently instructed in the truths of religion, he may dispense with the examination. In every case, in his method of procedure, he will have regard to the condition of those whom he has to examine. Thus in the case of persons of good position a formal examination might be omitted : it would be better to make it in a conversational form ». JODER, o. c., p. 7.

One must not, however, be too easy, even when one has no misgivings about the matter ; for, if it became generally known, some ignorant people might take occasion therefrom to jib at the examination to which they are subjected.

II. EXAMINATION TO BE MADE BY THE CONFESSOR.

333. Examination to be made by the confessor.

The examination *for the internal forum*, that is to say, as to the impediments of the forum of conscience, must be made by the *confessor* with minute care. It concerns the impediments of *vow*, of *public decency*, and especially of *crime* and of *illicit affinity*. Experience proves that certain confessors are occasionally wanting in this duty, and such neglect may subsequently lead to great difficulties and troubles of conscience.

Obviously, all intending parties without distinction are not to be interrogated as to all the impediments, especially as to that of crime. It is necessary to bear in mind what we have said above, in I ; but, on the other hand, one cannot lightly refrain from all inquiry, particularly as to the impediment of affinity ; a discreet question on this subject may generally be put with advantage,

unless the irreproachable conduct of the engaged parties clearly shows that it is quite needless.

Paragraph II. INSTRUCTION OF ENGAGED PARTIES AND OF MARRIED PERSONS.

Instruction for engaged parties and for married persons should be given by the *parish priest* both publicly, from the pulpit, and privately, on occasion of the examination preparatory to marriage ; it should also be given by the *confessor*. It is for the *parish priest* to instruct them on the nature and dignity of the matrimonial union, and on the principal duties of their state, without omitting, when occasion offers, a prudent admonition regarding the use of marriage. To the confessor above all it belongs to give direction as to the choice of the married state, and more intimate instruction concerning the use of marriage (1).

I. Instruction to be given by the parish priest.

324. *Instruction to be given by the parish priest : 1° in public ;*

A. In public.

Though it is true that the parish priest ought to be prudent and circumspect in the instructions that he gives in public, and especially in church, on the question of marriage, yet it would certainly be a mistaken prudence and a false modesty that could keep him from explaining the Catholic teaching concerning this sacrament, its sanctity and its serious duties ; for on the observance of these essentially depends the welfare of Christian society (2).

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1. Evidently no rigid distinction is to be drawn between the part of the parish priest and that of the confessor ; the duty of instruction that falls upon the latter, may also, according to circumstances, be discharged by the parish priest. This is self-evident, and will appear yet more clearly from what we shall say further on.

2. As Leo XIII says in the Encyclical *Arcanum*, « Not only, in truth, was marriage instituted for the propagation of the human race, but also that the lives of husbands and wives might be made better and happier. This comes about in many ways : by their lightening each others' burdens by mutual help, by a constant and faithful love, by having all their possessions in common, and by the heavenly grace which flows from the sacrament. Marriage also can do much for the good of families ; for, so long as it is conformable to nature and in accordance with the counsels of God, it has the power to strengthen union of heart in the parents ; to guard the holy education of children ; to temper the power of the father by the example of the divine power ; to make children obe-

Besides, anything calculated to shock youthful hearers, or to endanger their innocence, should be reserved for those instructions that are ordinarily given to married people alone at the meetings of their various confraternities. Accordingly :

1. The parish priest will expound the *true doctrine as to the nature of marriage,* as explained above ; namely, that marriage has been raised by Our Lord to the dignity of a sacrament ; that consequently, apart from the sacrament, there is no bond of marriage between baptized persons, and that hence the regulation of Christian marriage is entirely in the power of the Church, to which alone belongs the right of establishing prohibitory or invalidating laws in this matter.

Starting from this, he will show that civil marriage is nothing more than a mere legal formality, which certainly must not be neglected on account of the resulting civil effects, but which has no effect whatever on the essence of marriage ; that consequently, Christians become husband and wife only when sacramentally united in the presence of the parish priest and two witnesses ; he will add that it is not right that the civil formalities should take place any considerable time before the religious marriage (1).

He will then proceed to inveigh against the unhappy tendency of modern civil legislation, and insist upon the absolute indissolubility of the marriage tie, which can be broken only by death, though, in the judgment of the Church, there may be canonical reasons for permitting separation (2).

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dient to their parents, and servants obedient to their masters. From such marriages as these the State may rightly expect a race of citizens, who, being animated by a good spirit and filled with reverence for God and love for Him, will know that it is their duty to obey those who rule justly and lawfully, to love all, and to injure no one ». *(Authorized Translation*, London, 1880).

1. « All ought to understand clearly that, if there be any union of a man and a woman among the faithful of Christ which is not a sacrament, such union has not the force and nature of a proper marriage; that although contracted according to the laws of the State, it cannot be more than a rite or custom introduced by the civil law. Further, the civil law can only deal with and settle those matters which spring from marriage in the civil order, and which cannot possibly exist, as is clear, unless there be a true and lawful cause for them, that is to say, the nuptial bond. It is of the greatest consequence to husband and wife that all these things should be known and well understood by them, so that they may conform to the laws of the State if there be no objection on the part of the Church ; for the Church wishes the effects of marriage to be guarded in all ways, and that no harm may come to the children ». Encyclical *Arcanum* (Authorized translation).

2. « It should further be known that no power can dissolve the bond of Christian marriage when it has been ratified and consummated ; and that therefore those husbands and wives are guilty of a manifest crime, who wish, for whatsoe-

2. He will put in a clear light the *dignity of marriage*, so as to correct any erroneous view on the part of the faithful, who but too often look upon it as a purely worldly matter. For this, he may make use of the various considerations set forth above, in n° 55, which bring out in strong relief this particular point.

The more clearly the parish priest impresses upon his people the holiness and dignity of marriage, the greater efficacy will his words have in leading them to make a holy preparation for it, to seek it from motives of pure love rather than of passion, and to approach it in a state of continency and of prayer.

In addition to this, the pastor will make every effort to dissuade the faithful from all imprudent and sinful company-keeping, and from all unlawful familiarity ; he will strongly insist on the necessity of receiving this sacrament in a state of grace, lest they should be deprived of the necessary graces, and bring down upon themselves the curse of God instead of His blessing (1).

3. He will inculcate *the duties of married people to one another* and *to their children*, in accordance with what we have briefly explained in n°s 148 and 161, and he will also have recourse to the directions of St. Francis de Sales, o. c., P. III, chapter 38, entitled : *Advice to married men*, and to the advice given in works on this subject, mentioned in the Bibliography and to be cited later on. Cf. also the *Collat. Brug.*, t. IX, p. 188-190, and Stöhr, o. c., p. 484-489. Let him also dwell much on the mutual love that married people owe to one another, a holy and supernatural love, a love

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ver reason it may be, to be united in a second marriage before the first one has been ended by death. When indeed matters have come to such a pitch that it seems impossible for them to live together any longer, then the Church, allows them to live apart, and strives at the same time to soften the evils of this separation by such remedies and helps as are suited to their condition ; yet she never ceases to endeavour to bring about a reconciliation, and never despairs of doing so ». Encyclical *Arcanum* (Authorized translation).

1. « Pleust à Dieu » says St. Francis de Sales, l. c., « que son Filz bien-aymé fust appellé à toutes les noces comme il fut a celles de Cana : le vin des consolations et benedictions n'y manqueroit jamais, car ce qu'il n'y en a pour l'ordinaire qu'un peu au commencement, c'est d'autant qu'en lieu de Nostre Seigneur on y fait venir Adonis, et Venus en lieu de Nostre Dame ».

Marriage contracted in an unworthy and thoughtless manner is a source of great evils. « Such cases », Leo XIII says in the same Encyclical, « would seldom exist, if men and women entered into the married state with right dispositions, not influenced by passion, but thinking well of the duties of marriage and of its noble purpose ; neither would they anticipate their marriage by a series of sins which make God angry ».

that does not depend on bodily beauty alone, and that is not fostered by the warmth of passion alone ; let him inculcate forbearance with one another's defects and the practice of Christian patience ; let him insist on strict and stainless conjugal fidelity, and warn the unwary of the dangers arising from unguarded social intercourse with others (1).

He will, moreover, remind them « that duties of husbands and wives are neither few nor light ; although to married people, who are good, these burdens become not only bearable but sweet, because of the strength which they gain in the sacrament ». Encyclical *Arcanum*.

He will frequently and energetically combat the materialistic concept of life « which in our days pervades every place and infects even Christians ; in consequence of which, men pursue pleasure and give rein to their passions, while refusing to take upon themselves those burdens that no longer seem bearable ». *Instructions* of the Bishops of Belgium, l. c., p. 455. See also VERMEERSCH, *La Peur de l'Enfant*, p. 28 ss., p. 44 s. ; *Le Problème de la natalité*, p. 58 ss.

4. Obviously, matters that particularly concern the *use of marriage* must not be spoken of from the pulpit, except in general and veiled terms. Nevertheless, on occasion (e. g., in explaining the catechism), one should not omit to instruct married people that everything is not lawful for them, and that in the married state, sin, and even very grave sin, against chastity is possible. Often even, seeing the prevalence of onanism, it will be necessary to deal severely and forcibly with that disastrous vice, directly opposed to the end proposed by the Creator, and provoking the wrath of God ; adding that families having many children are loaded with divine blessings, and asking if many married people do not put an obstacle to the reception of the like.

There will, moreover, be opportunities for giving these instructions, as we have already said, in the confraternities established for married people (2), where these matters can be professedly spoken of, with greater freedom and detail, but always with due regard for chastity and modesty, as St. FRANCIS DE SALES speaks of them, o. c., P. III, ch. 39, *De l'honnesteté du lict nuptial*.

The holy Doctor, after making a comparison between the use of marriage and that of food, adds : « as eating simply for the nourishment and support of the body is a good thing, holy and imposed on us as a duty, so also what is requisite in marriage for the bringing forth of children and

1. Cf. EHRLER, o. c., p. 29 ss.

2. Likewise, say the *Instructions of the Bishops of Belgium*, p. 460, « during missions, at the meetings of men or of Christian mothers, or rather of all married people together ; as also on the occasion of a retreat in preparation for marriage, if such there be ».

the increase of the race is a good thing and a very holy one ». In like manner, too, he continues, as there may be sin in the immoderate use of food and drink, even grave sin, for instance, in drunkenness, so there may be sin in the use of marriage, and even grave sin, if such act is not in accord with the end of marriage.

B. Instruction to be given in private.

335.
2° *in private.* This private instruction of the intending parties, in preparation for their approaching marriage, must be given with the greatest care, either on the occasion of the examination, or preferably, if possible, at some other time (1).

At the outset, it will be well to remind them in general terms of the nature and dignity of marriage, the duties of husband and wife towards one another and towards their children. It would be well also to put in their hands some little manual on this subject (2).

After this introduction, the parish priest will insist particularly on the obligation of conferring *baptism* in case of necessity, and he will not omit to instruct them how to baptize, so that they may be able to do it themselves, should the occasion arise ; he will warn them, however, that they can baptize their own child only in the absence of any other competent person. He will further give them, and especially the bride, some practical advice as to baptism in case of miscarriage, in accordance with the *Collat. Brug.*, VIII, p. 561 ss.

The parish priest then will question the engaged parties prudently and circumspectly, to find out if they are sufficiently instructed as to the *use of marriage*. If he finds that they are *igno-*

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1. In the *Pastor Bonus*, 1905, p. 362, it is recommended not to join the instruction to the examination, but to leave it till the last week before the marriage ; the parties will then come the more readily as the examination will be over.

2. For instance certain works quoted in our bibliographical list, such as : Devine, o. c. ; Gerrard, Marriage and Parenthood ; Slater, o. c. Here some other English brochures : Girardey, C. SS. R., Popular Instructions on Marriage ; Bishop Egger, The Catholic Father ; and The Catholic Mother ; Cramer (from the German of), The Christian Father ; and, The Christian Mother ; Hohn, Marriage Guide-book.

Among the Penny Publications of the C. T. S. (London), Cardinal Mercier, The Duties of Conjugal Life ; Charnock, S. J., Marriage.

rant in this matter, as sometimes happens with young and pure-minded girls, he will not hesitate to instruct them on the nature and primary object of the marriage union, or he will take care to have them so instructed, especially in the case of very young and modest fiancées, by referring them to their mother or to some other trustworthy woman.

It would, in truth, be a cruel thing to permit such persons to embrace, and for life, a state of which they are entirely ignorant, and to impose on them a yoke which, for want of timely instruction, they may, when too late, find hateful and unbearable.

There is no need to say that it is necessary to be prudent and circumspect, and to avoid any comparison with the brute creation ; rather should he bring out the dignity of marriage and the exalted nature of the marriage act, which makes married people, in some sort, co-operators with God in the sublime work of creation, and calls upon them to increase the number of the children of God and of the heirs of heaven (1).

When once the engaged parties have been instructed as to the nature of the marriage union, the parish priest will not omit, at least in general, to exhort them to the observance of conjugal decorum and modesty, according to the directions given above for public instruction.

It is for him to judge, according to circumstances, if he ought to be yet more explicit, or refer the parties to their confessor for supplementary instruction in this matter. It is often expedient, and many writers of note (2) make it almost a general rule, that the

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1. Many writers recommend giving to engaged couples a little book of instruction on the physiological function of marriage.For this purpose some recommend, among others, the little work already mentioned, *Die Ehe*, (an English edition has just been published), put forth for the use of engaged parties and of married people by a society of doctors, priests and ladies. One will find in this work, written with a most excellent purpose, much useful advice together with physiological explanations capable of rendering great service to certain persons ; but such reading, in our parts, should not be recommended to all indiscriminately. See, on this subject, the *Th. pr. Quartalschrift*, 1910, p. 302, which recommends this book, as well as another of the same kind, already mentioned, *Das Eheleben*, by Wilhelm.

2. Such are Hartmans, o. c.; *Pastor Bonus*, l. c.; Aertnys, *Ned. Kath. Stemmen*, l. c., who gives a plan of instruction.

parish priest should himself tell the engaged parties what is *lawful* and *unlawful* in marriage, following the line that we shall suggest further on with regard to the duties of the confessor.

Such instruction will not give offence to the parties concerned, and his words will often prove more fruitful than those of the confessor, who is sometimes rather a young man, often unacquainted with the parties, and unknown to them, and who has, besides, many other points of the highest importance to speak about in the course of confession.

Further, the pastor will carefully caution the future husband and wife against the vice of *onanism*; he will do so with all the greater clearness and emphasis, if the evil is spreading in his parish, and he has some reason to suspect that the couple before him purpose following that pernicious practice.

Finally, he will tell them that if at any time they have doubts, they must not fear to lay them before their confessor; so will they live in the married state with a safe conscience. That, if they have need of medical advice and assistance, they must choose an upright practitioner of sound Christian principles, for there are some doctors who do not hesitate to recommend practices that are unlawful and contrary to morality.

II. Instruction to be given by the confessor.

A. On the use of marriage.

336. Instruction to be given by the confessor:

1. *To engaged parties:* a/ If the confessor finds them in a state of ignorance as to the primary duty of marriage, he will instruct them, or cause them to be instructed, as stated above.

1° as to the use of marriage;

b/ If the parties *ask him what is lawful in marriage,* he will explain to them briefly the principles established in the course of this treatise, which govern the whole of this matter, and in accordance with which penitents may quite safely regulate their consciences. The following is a summary of them:

a) The conjugal act is lawful, and husband and wife are mutually bound to it in strict justice. *b*) Everything that has for its object the procreation of children is permissible between husband and wife. *c*) Generally, too, all acts, not having conception for their direct object, are exempt from sin, or at least from mortal sin, provided they are not positively opposed to the end of gene-

ration. *d*) There is grave sin in all use of marriage positively opposed to the end of generation; in particular, onanism is a grave sin and contrary to nature, for this criminal practice radically destroys the end proposed by the Creator, and provokes the avenging justice of God even in the present life.

It is advisable to instruct the parties thus, *even if they do not ask*, unless they have been already instructed by the parish priest, or are known to be sufficiently conversant with their duties, or are absolutely irreproachable in their conduct; in this way the evil is prevented, and here prevention is better than cure.

The confessor will also tell such penitents that, on the one hand, they must avoid excessive scrupulosity in the use of marriage, but that, on the other hand, they must in everything *observe natural decorum*; that married people should be conscious of the dignity of the act they perform, and mindful of the words addressed by the young Tobias to his chaste wife : « For we are the children of saints, and must not be joined together like heathens that know not God », and of the words of the Archangel Raphael to the same Tobias : « For they who in such manner receive matrimony, as to shut out God from themselves, and from their mind, and to give themselves to their lust, as the horse and mule, which have not understanding, over them the devil hath power » (1).

Finally, he will advise them to come to confession again some time after their marriage, that they may ask and receive a solution of any difficulties they may have as to their state and their duties (2).

2. *To married people* : a/ *If they neither confess* nor ask anything concerning the use of marriage, most frequently, except in the case of those whose high moral character is well known, it will be well to ask generally if they have properly fulfilled the duties

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1. *Tob.*, VIII, 5 and VI, 17. See also the *Rit. Rom.*, tit. VII, ch. 1, n° 17, and what we shall say under c/, in 2/. This advice is addressed especially to the *husband*, who sometimes, by his want of consideration, on the very threshold of married life, deeply wounds the modesty of his wife, and irrevocably alienates her affection.

2. See the *Pastorale Brugense*, p. 122.

of their state. Should the confessor suspect any serious delinquency, he will press the matter more closely, and discreetly invite the person concerned to make a full confession of his sins ; thus the confessor will avoid any negligence, on his part, being responsible for the married parties continuing to live in sin. See the principles and rules laid down above, in n^os^ 143 ss., in connection with *onanism*.

He will acquit himself of this duty with prudence, so as not to give his penitents any knowledge or inkling of things of which they are ignorant, and in such a way as not to wound modesty.

b/ Si *anxios* sese dicunt *circa conjugalia jura ac officia*, tunc præprimis sacerdoti opus est singulari prudentia et modestia. Nam ex una parte, uti jam notavimus et iterum notandum volumus, non sufficit præ nimia modestia dubia removere, generali formula quietem commendando, ac ita responsum eludere, cum maximo nonnunquam detrimento animæ ac pacis familiæ, ex malè intellectis juribus et officiis respectivis conjugum continuis jurgiis disturbatæ (1) ; ex altera vero parte difficilius cavetur ab omni modestiæ læsione, ubi ad particularia est descendendum nec sufficit abstracta proponere principia.

Porro prudentia suadet ut hujusmodi pœnitentes, in hisce negotiis anxios repertos, caute adducat confessarius ut ipsi sponte exponant anxietatis objectum, potius quam interroganti et scrutanti sacerdoti aperiant. Præterea solerter distinguat et secernat confessarius dubia theologica a dubiis mere physiologicis, et optime compertum habeat et alta mente repostum, suum officium non esse hæc ultima solvere, sed illa solvenda relinquere medico vel chirurgo, praesertim si agatur de uxore : memor sit se non esse medicum corporis sed animæ, seque illa dumtaxat impune tentare pericula quæ adeunda strictum urget officium.

Tandem, in ipsis enodandis difficultatibus subjectis, attendat confessarius in hisce rebus passim sufficere ut conjuges sciant quid faciendo vel omittendo peccatum *mortale* effugere queant, adeo ut regulariter abstineat ab ulteriori explicatione circa venia-

1. Ita fit ut uxor non obtemperet marito, quia falsa conscientia laborat circa frequentiam copulæ, et signanter circa liceitatem actuum non consummatorum et alia hujusmodi : quarum dubitationum solers enodatio quietem reducet in conscientia et pacem in familia.

lem inordinationem, puta circa modum coeundi et alia hujusmodi, in qua cæteroquin intimiori explicatione gravius non raro latet castitatis sacerdotalis discrimen.

c/ It is well also to tell married people that *all that is permissible, is not always advisable*, and that it becomes Christians, even in marriage, to lead a chaste and well-regulated life, to put a check on their passions and set bounds to their desires, and to keep in view the sublime end of marriage rather than the gratification of the senses.

Cardinal Mercier says : « Even in the married state, husband and wife must moderate their desires. Every husband ought to show consideration for his wife's disposition, the tact that prudence and delicacy of feeling demand. The time may come when the safeguarding of the health of one of the parties may put a barrier between them, perhaps for a long period ; what respect will they show for it then, if they know nothing of the first efforts of continency ? » (1).

It is for this reason also, that the *Instructions* of the Bishops of Belgium say, l. c., p. 456 : « Confessors shall exhort all Christian husbands and wives to abstain occasionally from the conjugal act, during a certain time and by common agreement, and thus to practise freely that great virtue which many will afterwards have to observe as a matter of necessity ».

When occasion offers, one will also impress on the parties the gentle counsels of Saint Francis de Sales, o. c., P. III, ch. 39, showing them that, just as it is unbecoming to be always thinking of eating, so it is not right that married people should be for ever thinking of carnal delights, and live according to the flesh rather than according to the spirit ; that they may, in truth, use the world, as their vocation requires, but in such a way as not to fix their affections on it, but to be as free and unfettered for the service of God, as if they used it not (2).

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1. *Lettre Pastorale*, 1909. See also above, nº 141, and Wilhelm, o. c., p. 99 ss.

2. We may here quote the words of J. L. Vivis, o. c., who, in describing the duties of a husband, says to him : « If you have taken a wife that you may have children, follow this noble purpose alone and not your passions, imitating therein the holy patriarchs who seemed to be united with their wives for no other object.

B. On the choice of the married state.

337.
2° *as to the choice of the married state.*

1. Only those should be encouraged to refrain from marrying in order to adopt *the more perfect life of celibacy*, who really understand the words of Christ, and desire to abstain from carnal pleasures for the kingdom of heaven, that is to say, for a supernatural motive, whether it be for the love of chastity, or for the purpose of giving themselves up with greater freedom to prayer and works of charity.

2. *In general*, also, *quite apart from the attainment of perfection*, those should be advised not to marry or even forbidden to do so, who are unfit to marry or incapable of supporting the burdens of the married state, as well as those whose condition of health is such as to involve serious danger for husband, wife or children.

Such are, besides the impotent, all who are so mentally deficient that it is quite impossible for them to look after the upbringing of any children they may have ; and all who are so physically weak or defective that it is hardly possible for them to procreate or bring forth ; finally, such as are afflicted with any grave malady that may be transmitted to the partner or children, such as phthisis or syphilis, at least in the period of infection (1). Young people, whose powers are not yet fully developed, should also be dissuaded from marrying (2), and great prudence must be exercised in the case of the hysterical (3).

« If, however, you use marriage as a medicine for allaying the unruliness of your passions, according to the advice of the Apostle, do not bring on the disease in order that you may have occasion of taking the medicine....For, what man in his senses takes medicine for the pleasure of it, or destroys its power by constant use ? The body must be practised and habituated to go without medicine unless there is real need for it ; then, if at times it is wanting, we shall not succumb to the disease, having already acquired some strength by practice ; for disease has less effect on a well nourished body.

« Husbands should seek for pleasure but rarely and with restraint. They should remember that they are men, and that nature has given them strength of character, so that, despising pleasures and setting them aside, they may acquire honour and esteem by their labours... ; they should remember that they are Christians, and that they have renounced the world and its delights ».

1. See above, nos 219b and 225b, as to how far the social authority has the power of forbidding marriage, even under pain of nullity, to the diseased or degenerate.

2. See Knoch, in *Revue eccl. de Liège*, VIII (1913), p. 383 ss. ; *Die Ehe*, ch. III ; Treub, *Verspreide Opstellen*, under *Huwelijk en Ziekte* ; Baur, o. c., p. 55 ss.

3. It is not rare for hysterical persons, after conjugal relations, to experience

We say « *in general* », because, with the exception of the case of impotency, marriage may sometimes be permitted to such persons, for a higher motive, e. g., to avoid the imminent danger of incontinence ; but the other party must then be informed of the defect, the consequences of which he will have to put up with, as we have said in n° 29.

3. With regard to persons fit to marry, and not called to a higher state of perfection, they should as a rule, especially men, be advised to marry, and sometimes even told to do so. Abstention from marriage through egoism, or a vain fear of the burdens of married life (1), or from contempt of marriage and of married life must be highly disapproved (2).

Note. The parish priest should keep these principles in view whenever he is asked for advice on this subject or when he thinks it advisable to intervene of his own accord.

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a recrudescence of their malady, the more so as young women of this kind frequently have a horror of the use of marriage. A happy result may, nevertheless, sometimes be hoped for, and such persons may even be advised to marry, provided the hysteria has not reached a critical stage, and the prospective husband is of a good and gentle disposition ; especially is this so when the young woman leads a restless and troubled life at home, and does not find with her own relations much sympathy in her unfortunate state of health. See the *Th. Pr. Quartalschrift*, 1898, p. 310 ss. See also Dr. Nyhoff, o. c., p. 32 s., who takes a stricter view.

1. Cf. Vermeersch, *La Peur de l'Enfant*, p. 28 ss. ; he shows the influence of egoism in this matter, especially among people of wealth and position. See also Knoch, *L'Education de la chasteté*, p. 33, where he vigorously rebukes such celibates for their egoism : « The Church condemns all celibacy regarded simply as a means of freeing oneself from the burdens of the married state, of leading an easy and pleasant life that leaves one free and unfettered to answer to the calls of society and pleasure ; it condemns especially all voluntary celibacy adopted as the result of a hideous calculation of having one's hands more free for evil-doing, or for the unavowable purpose of remaining without a home so that one may more freely frequent another's, with the risk of disturbing and destroying it ; the caste of « *vieux garçons* » has little sympathy from honest folk ».

2. Thus in the Synod of Gangra (circa 343), can. 9 : « Shall anyone live unmarried or in a state of continency through contempt of marriage and not on account of the beauty and holiness of virginity, let him be anathema ». Hefelé-Leclercq, o. c., I, 1036 ; compare with canon 14, *ibid.*, p. 1039.

Paragraph III. REGISTRATION.

338. By rule, the duty of registration falls on the parish priest;

According to the regulations of the Decree *Ne Temere*, art. IX :

A. **By rule**, it is the duty of the *parish priest*, in whose parish the marriage has taken place :

1. To enter at once, either personally or by another specially designated by him for this purpose (1), « *in the register of marriages*, the names of the parties and of the witnesses, the place and date of the marriage, together with all other particulars, as prescribed by the rituals or by the Ordinary of the place (2) ; and he must do this, even if a priest delegated by himself or by the Ordinary officiated at the marriage » (3). § 1.

2. « To make a note also (in the margin) *in the register of baptisms*, of the fact and date of a marriage contracted in his parish ».

« If one of the parties was baptized elsewhere, the parish priest who officiated at the marriage must inform the parish priest of the place of baptism of it, either directly or through the agency of the episcopal curia (especially in the case of an unknown parish in some other diocese), in order that the marriage may be entered in the register of baptisms » (4). § 2.

Observe with regard to this last provision :

a/ It applies to the two parties ; and so, if they have both been baptized elsewhere, and in different parishes, notification of the marriage must be sent to the two respective parish priests.

b/ This provision has for its object, as we have seen in n° 332, to facili-

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1. It is not right to entrust this office to a laic, but whoever the person designated may be, the parish priest remains responsible.

2. One is therefore at liberty to employ either the formula given in the Roman Ritual, or that in use in the diocese ; nevertheless it is better that all should employ the same. In the diocese of Bruges one can take one's choice, but it is the wish of the Bishop « that at the end of the *form of entry of marriages in the register*, it should be added if the parties have or have not received the nuptial blessing during mass ». *Prosynodal Meeting*, 1908, in the *Collat. Brug.*, t. XIII, p. 431.

3. The Bishop cannot, without the authorisation of the Holy See, permit the marriage to be entered indiscriminately by any priest who officiates thereat in virtue of delegation. This authorisation has been granted as a favour to the Bishop of Mangalore (India), by a decree of the S. C. de Sacr., 12 March 1910, under 9, ad 4m. See the *Collat. Brug.*, t. XV, p. 317, and, in the contrary sense, Boudinhon, in the *Canon. Contemp.*, 1910, p. 265, and *Mariage et Fiançailles*, n. 98.

4. The Bishop of Bruges, in the same *Prosynodal Meeting*, l. c., p. 430, directs that this transmission shall *always* be made through the agency of the episcopal curia, if the parish priest of the place of baptism belongs to another diocese.

tate inquiry as to free state, and in particular to obviate more effectually the danger of bigamy. The examination of the register of baptisms, or the baptismal certificate that parties who are strangers in the parish have to produce, will show at once if they have contracted a previous marriage (1). This is also the reason why, as we have already pointed out in the same place, the obligation has been imposed of demanding from parties who marry in a parish other than that of their baptism, a *certificate of baptism* containing any marginal entry there may be (2).

c/ « The attestation of marriage to be transmitted to the parish priest of the place of baptism shall contain the surnames and Christian names of the parties and of their parents, the age of the contracting parties, the place and exact date of the wedding, as well as the surnames and Christian names of the witnesses ; the parish priest shall sign the document and seal it with the parish seal. The address shall give with exactness the parish, the diocese, the hamlet, i. e., the place of baptism, and all other particulars necessary for the post » (3).

d/ « Should it happen that... the parish priest of the place of baptism, on receipt of this attestation, discovers that one of the parties was already bound by the bonds of a previous marriage, he shall immediately give notice of the fact to his colleague who has officiated at the attempted fresh marriage » (4).

e/ It would be advisable for the Ordinary to determine the time within which this notification must be made, and to direct that the certificate of marriage shall mention the date of baptism, so that the parish priest of the place of baptism may more easily find the place where the marginal note has to be made (5).

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1. This annotation will also facilitate the discovery of an impediment of legitimate affinity.

2. Instruction of the S. C., de Sacr., 6 March 1911, ad 1m. This provision serves a twofold purpose : the parish priest who has to celebrate the marriage will thus easily see if the parties have been previously married, and he will at the same time know who is the parish priest to whom he has to send the notification. The Bishop of Bruges had required this since 1908. Cf. *Collat. Brug.*, t. XII, p. 602.

3. Same Instr., in 2o.

4. *Ibid.*, in 3o.

5. This is why the Bishop of Bruges, in the same Prosynodal Meeting, l. c., p. 430, made the following decree : « To obviate the danger of forgetting, we ordain that this transmission be made *within two days* after the celebration of the marriage..., and that, in every notification, the *day* of baptism be given ».

We may here also call to mind the decree of the diocese of Bruges concerning the insertion of the legitimation of natural children. See the *Collat. Brug.*, t. VI, p. 122.

f/ Finally, the Instruction of 6 March 1911 determines, in 4° : « that Bishops shall use vigilance in securing the religious observance of these rules ; and that, if they have to deal with transgressors, they shall take care to bring them to a sense of their duty, if need be, even by recourse to canonical penalties ».

exceptionally on another priest, or on the parties, or on the witnesses.

B. **By exception**, in cases where, in conformity with art. VII of the decree *Ne Temere*, a marriage has been celebrated *in extremis* before a priest other than the parish priest of the place, without any delegation from him or from the Ordinary, there is a grave obligation on the officiating priest and on the contracting parties to have the marriage entered *at once* both in the register of marriages belonging to the place in question, and in that of baptisms of the place or places where the parties were baptized (1). This obligation binds the priest and the parties jointly and separately, so that, in the others' default, it falls entirely upon the one.

In like manner should it happen under the provision of art. VIII, that a marriage has been celebrated without parish priest or delegated priest, but before two witnesses only, these witnesses would be jointly and separately bound, together with the contracting parties, under grave sin, to take care to have the double entry duly made.

Note 1. It is important to take note of what we shall say later, at the end of n° 411, and of what we have already said above, in n° 94, on the subject of marriages of conscience, and of their inscription in the secret register. Observe, too, the rule laid down in the Instr. of 6 March 1911, concerning marriages, the legitimate and entire proof of which is wanting, and which are guaranteed only by the attestation and oath of the witnesses of whom we have spoken in n° 84. Such marriages are to be entered « not in the common marriage register, but in another and distinct register, specially kept for this purpose ». *A. A. S.*, III, p. 103.

2. No registration of the *betrothal contract* is prescribed. Nevertheless, where it has been duly made, it is advisable that a record of it should be kept in a special register, according to the form given at the end of this work. Moreover, it would be an advantage to enter there various particulars concerning the publication of the banns, delegation or permission that may have been given to a parish priest of some other parish, and the like, as well as particulars of the marriages of parishioners celebrated elsewhere. See *Pastor Bonus*, 1913, p. 291 s.

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1. They can satisfy this obligation by notifying the celebration of the marriage to the parish priest of the place, or to the proper parish priest of the contracting parties, not omitting to state the date and place, as well as the parish of baptism.

Appendix II.

MATRIMONIAL PROCEDURE.

339. *Preliminary notions.*

Preliminary notions. We have seen above, in nos 218 and 221, that all matrimonial causes appertain to the ecclesiastical judges, and that they must be dealt with by the Bishop or by the Holy See, through different offices, according as they are to be treated in a disciplinary or strictly judicial manner.

Matrimonial causes, *strictly so called*, are those which concern the *nullity of the marriage bond, as it affects the permitting of a fresh marriage* (1). It is the rule that pseudo-married people cannot marry again until they have obtained an authoritative declaration from the Bishop or from the Holy See (2). Cf. no 282.

Such a declaration of nullity cannot be made *regularly*, at least in the episcopal curia, except after a *judicial process*, conducted with all the formalities prescribed by law, in accordance with the Constitution of Benedict XIV, *Dei miseratione*, of 1741 ; the Instr. of the S. C. C., 22 Aug. 1840 ; the Instr. of the C. S. O., 20 June 1883, to the Eastern Bishops ; Instr. of the S. C. de P. F., of 1883, as well as the documents relating to particular impediments, such as the Instructions of the C. S. O., of 1858 and 1890, on impotency, and the Instr. of the C. S. O., of 1868,on the impediment of *ligamen* (3).

We say « *regularly* », because sometimes it is possible to dispense with formalities prescribed by the documents mentioned above, especially by that requiring a second hearing, provided, however, that a defender of the bond be appointed, and provided that a reliable and authentic document, or, in the absence of that, conclusive arguments, *afford clear proof of the existence of the impediment and the absence of dispensation* ; notably « when it is a case of the impediment of *disparity of worship*, and it is

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1. We speak here only of matrimonial causes strictly so called. For other causes, see De Becker, *De Matr.*, p. 484.

2. In like manner, if a marriage has been declared null, e. g., on account of impotency, and if afterwards its validity is ascertained, one cannot proceed to the re-establishment of the said marriage until the sentence pronounced has been declared null.

3. These different documents are given in the same order by Bassibey, *Le Mariage devant les Tribunaux ecclésiastiques*, Paris, 1899, Appendice, 2e série ; the *Instructio Austriaca* may also be found there in part.

evident that one of the parties was baptized and the other not ; when there is question of the impediment of a *former marriage (ligamen)*, and it is absolutely certain that the first partner is still living and that the marriage was legitimate ; finally, when it is a case of *consanguinity* and *legitimate affinity*, or even of *spiritual relationship* or of the impediment of *clandestinity* (1) » ; as also, apparently (2), when it is clearly proved that the dispensation from disparity of worship is null on account of the refusal or non-exaction of the precautions (3).

The following is a brief outline of the canon law concerning the *judicial procedure* to be observed in these matrimonial causes.

I. **Action in nullity.**

340. Action in nullity of marriage.

« That a legal action for nullity of marriage may be admissible by the ecclesiastical tribunal, it is necessary that a regular and legal charge should have been made against it, or, in the case of certain kinds of impediments, that the judge should have taken *ex officio* proceedings in the matter » (4). For it does not appertain to everyone, or in every case, to bring a charge of nullity against a marriage, neither can the judge, in every case, take proceedings against it in virtue of his office.

If the charge rests on an impediment *of public right*, such as that of consanguinity, affinity, public decency or clandestinity, the right of taking action belongs to every Catholic who is free from the suspicion of false and

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1. Decree of the C. S. O., 5 June 1889 *(N. R. th.,* XXVI, p. 29 ss.), and the decrees of the C. S. O., 16 Feb. 1894 (A. A. S., XXVII, p. 142), 6 Apr. 1895 *(N. R. th.*, XXVII, p. 477 ss.) and 27 March 1901 *(Canon. Contemp.*, 1901, p. 579 ss.) ; see, on these documents, De Becker, *De Matr.*, p. 482 ss.

2. Besson, *N. R. th.*, 1913, p. 13 s., is doubtful about the extension of the discipline named to the present case. He is of opinion that the only concession made by the decree, of 21 June 1912, is that the Bishop can settle the cause himself, without appealing to the Holy See for a definitive sentence, but that he is still bound by the legal formalities of Benedict XIV.

3. Decree of the C. S. O., 21 June 1912, in the *A. A. S.*, IV, p. 443. See also De Becker, o. c., p. 484, who observes that the formalities are not to be all employed indiscriminately « every time that, in the absence of all danger of scandal, there is a question not of permitting a fresh marriage, but of permitting the use of an existing, but hitherto illicit, marriage ». See also the Indult granted to the Archbishop of Cologne in the decree of the C. S. O., 2 July 1892, ad 2m, in the *N. R. th.*, XXVI, p. 23 ss. Cf. also Lehmkuhl, in the *Cath. Encyclopaedia*, under *Divorce*, V, p. 59, where he remarks that sometimes a faculty is granted to Prefects Apostolic, to proceed summarily and extra-judicially to the declaration of nullity, when two experienced theologians or canonists, on being consulted, hold that the nullity is indubitable.

4. Instr. of the S. C. de P. F. 1883, p. 1, par. 3.

malicious denunciation, and who has not voluntarily omitted, before the marriage, to reveal an impediment then known to him. In such cases the judge also can take *ex officio* proceedings.

On the other hand, when it is a question of an impediment of *private right* (1), such as error, fear or impotency (2), the right to impugn the marriage belongs to the parties alone, either jointly or separately, and charges coming from other quarters are not judicially admissible ; neither can the judge take *ex officio* proceedings unless the nullity be public or manifest. In such cases he will demand the revalidation of the marriage, or will cause an action to be brought by some competent person (3).

On the question of whether, and to what extent, a marriage may be impugned, after the death of one of the parties to it, with a view to the legitimation of the children or to certain temporal advantages, see De Becker, *De Matr.*, p. 478, and the *Canon. Contemp.*, 1908, p. 233 s., on the *Causa Mediolanen.*, 25 Jan. 1908.

Note. In the matter of a marriage *to be celebrated*, anyone can and ought to make known any impediments that exist ; not everyone, however, but only those interested can make *judicial* opposition to such prospective marriages. See above, n° 45.

II. Competence of the Judge.

341. The competent judges are the Pope and the Bishop.

1. The *Pope* can deal with all causes, throughout the whole Church, and indeed reserves to himself those of Princes (4) and of non-consummation (5). The ordinary instrument of the Holy See for causes *that have to be treated judicially*, is the Tribunal of *the S. Rota*, as we have stated in n° 221 ; according to some authorities, its competence is *exclusive*, not even excepting causes that concern the Pauline privilege, or the impediments of mixed religion and of disparity of worship ; it is true, as we have said in n° 351, that all questions relative to marriages involving mixed or different religion must be referred to the Holy Office ; but if that considers the matter one for

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1. On the difference between impediments of public right and of private right, see above, n° 235.

2. Impotency is ordinarily an impediment of private right, and it follows the rules of such ; some, however, are of opinion that it may be considered as an impediment of public right in the case of eunuchs and castrati. See Sägmüller, o. c., p. 595 ; Schnitzer, o. c., p. 356 ; Kutschker, o.c., III, p. 44 s.

3. See Bassibey, o. c., nos 188 and 172 ; *Instr. Austr.*, nos 118 and 132; De Becker, *De Matr.*, p. 477 s.

4. See the decree of the S. C. de Sacr., 7 March 1910, cited in n° 363.

5. See below, n° 351. Cf. Lega, o. c., n° 433, who observes that the Holy See, to which the matter must be referred directly, delegates the Ordinary to conduct the proceedings as far as the definitive sentence exclusively.

judicial procedure, it must in due course of law send it on to the S. Rota (1). See De Meester, in the *Collat. Brug.*, t. XIV, p. 368 and the note, and t. XV, p. 252 s. ; Ojetti, *De Romana Curia* n° 33 s. ; Monin, o. c., p. 225 ss. (2) ; Gentrup, in *Archiv f. k. Kirchenr.*, 1913, p. 28 s.

2. The *Bishop*. Here the competent judge is the Bishop of the place of *domicile* (3), i. e., of the *husband*, since the domicile of the man is also that of the wife (4). To this exceptions must be made for, a) the case of *separation* legitimately effected ; to this we must apply the legal axiom, « *actor sequitur forum rei* » (i. e., the plaintiff follows the court of the defendant), so that the competent judge is the Bishop of the place of domicile of the party, whether husband or wife, against whom the action is brought (5) ; b) the case of *malicious desertion* of the wife by the husband ; in which case, the wife can bring her cause before the Bishop of her own domicile, or before that of her husband's domicile, at choice (6). c) The case of a *mixed marriage*, to which the rule given in the decree, already cited, of 1902, ad 1m, applies: « the husband and wife, in mixed marriage causes, are subject to the Bishop of the diocese in which the Catholic party is domiciled, and if both of them are Catholics, in consequence of the non-catholic party having been received into the Church, they are subject to the Bishop of the diocese in which the husband has his domicile » (7).

The judge of *first* instance is ordinarily the *Bishop* ; of *second* instance, the *Metropolitan*, and of *third* instance *the S. Rota*. This last is also judge of first instance in those causes that the Pope, whether on his own

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1. It follows at least from the decree C. S. O., 15 Febr. 1910 (A. A. S., II, p. 56), that the Holy Office, whether it be competent or not itself to deal with the causes, has the right to refer the cause brought before it to the S. Rota to be judicially dealt with.

2. Of a different opinion are Besson, *N. R. th.*, 1910, p. 354 ss. ; O'Donnel, in *Irish Eccles. Record*, 1912, p. 642 ss. ; Lecler, in *Collat. Namurc.*, t. VIII, p. 406.

3. On the question whether the Bishop is also a competent judge as Bishop *of the place of the contract*, see Lega, o. c., n° 436 ; the *Canon. Contemp.*, 1903, p. 659 ss., and the *R. th. fr.*, 1903, p. 712, on the decree of the C. S. O., of 22 June 1903.

4. *Instr.* of the S. C. de P. F., 1883, par. 2, where it is also stated « that after the summons has been served, change of domicile by the parties involves no change of competent judge ».

5. *Ibid.*

6. *Ibid.*

7. The decree of the C. S. O., of 23 June 1903, also has reference to this : « When it is a question of a mixed marriage to be contracted with a heretic divorced from a heretical wife by a decree of the civil court, the competent judge will be the Bishop of the place of domicile of the Catholic party, to whom it belongs to decide as to the free state of the contracting parties ».

initiative, or at the petition of the parties (1), calls before his own tribunal, or which the S. Congregations, before whom they have been brought, have referred to the S. Rota for judicial decision (2). See the *Collat. Brug.*, t. XIV, p. 429 s.; Ojetti, *De Curia*, n° 13.

342. *Procedure :*

III. **Procedure** (3).

A. *Constitution of the Tribunal.*

for the constitution of the tribunal,

There must always be a *judge*, a *chancellor* or notary, and a *defender of the bond*. To these *may* be added assessors (for the judge), substitutes to take the place of one of the three requisite members, and two consultors, one of them a theologian and the other a canonist. See Bassibey, o. c., n° 4 s., n^{os} 502 and 515.

for the drawing up of the documents,

B. *The method to be followed in drawing up the judicial documents* is given in detail in the *Instr.*, already mentioned, of the S. C. de P. F., par. 12 to 23 inclusively.

C. *Delivering of judgment, appeal and second instance* (4).

for the delivering of judgment,

1. Judgment cannot be delivered before the defender of the bond has declared « that he has no more arguments to advance and no further inquiries to make » ; it is also recommended that the opinion of the two consultors be asked.

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1. Cf. the *Causa Ravennaten.*, 15 May and 29 Dec. 1911, in the *A. A. S.*, III, p. 483 ss., and IV, p. 327 ss. ; the *Causa Eboracen.*, 9 Dec. 1911, *A. A. S.*, IV, p. 1464.

2. When the Congregations, before which the causes are brought, decide in meeting that they must be treated judicially, they must ordinarily refer them to the competent tribunal, according to the general rule already given, and consequently, for the first instance, to the Bishop. They may, however, also refer them directly to the S. Rota ; but for that, the authorisation of the Sovereign Pontiff and a rescript of commission are necessary (see the *Causa Tunkinen.*, of 7 July 1911, in the *A. A. S.*, III, p. 661 ss.), except for causes of non-consummation, which the S. C. de Sacr. has the right of referring directly to the S. Rota, as well as, in accordance with what we have just said and what we shall say in n° 351, for the causes relating to mixed marriages, which the C. S. O., has equally the right of referring directly. See the decree of the S. Consistorial Congr., of 19 Jan. 1901, in the *Collat Brug.*, t. XIV, p. 372, in the note, and the decree of the same Congregation, of 15 Feb. 1910, in the *Collat. Brug.*, t. XV, p. 251 ss.

3. See, in Pierantonelli, o. c., and Sagnori, o. c., specimens of procedure and judgments with all the documents explained in detail. One may also read with profit Pisani, o. c., p. 45 ss. ; Boudinhon, *Le mariage religieux*, p. 42 ss.

What we shall say of procedure has reference to the episcopal tribunals. For the Tribunal of the Holy See, the S. Rota, see the *Lex Propria* of the S. Rota, in the *Acta Ap. Sedis*, I, p. 20 ss., and the *Collat. Brug.*, t. XIV, p. 431.

4. Same *Instr.* of the S. C. de P. F., par. 24 s.

for appealing, 2. If the judgment is in favour of validity and no one appeals against it, the matter rests there. If, on the contrary, judgment for nullity is pronounced, the parties interested may appeal against it, and, where they make no demand, the defender of the bond (1) must appeal, in the exercise of his office : to the metropolitan curia of the diocese of first instance, or, if the court of first instance be that of the Metropolitan, to the nearest metropolitan curia (2), or to another episcopal curia (3), or to the Holy See (4) ; but if the first instance was held before the S. Rota, the appeal is made from one turn to another (5) ; in the meantime, the parties are forbidden to contract a fresh marriage.

for proceeding to third instance. 3. The second judgment will either be in agreement with the first or different from it. If it is different, appeal to the Holy See *is obligatory*. If it is in agreement with the first, and both judgments are in favour of the validity of the marriage, the party impugning it *may* appeal to the Holy See. If both judgments are for the nullity of the marriage, it is still *optional* for the parties or the defender of the bond, to appeal against it ; if no appeal is made, the parties are then at liberty to contract a fresh marriage, unless that has been forbidden them for some other reason. It should, however be noted that the privilege of matrimonial causes remains unimpaired, that is to say, they never reach the condition of an adjudicated case (6).

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1. Cf. HEINER, in *Theologie und Glaube,* 1910, p. 806 s., who says that it is the duty of the defender of the bond to appeal, even when the nullity has been declared *evident* in the first instance, except in cases relating to the impediments mentioned in n° 339.

2. See in the *Rev. ecclés. de Metz,* 1910, p. 361 s., the indult of the S. C. Consistorial., of 31 June 1910, granting for ten years « that the Curia of Metz and that of Strasburg should be constituted reciprocally as tribunals of second instance for deciding matrimonial causes » ; hitherto these Curiae, having no metropolitan curia, had to have recourse to the Holy See for the second instance, which entailed great expense.

3. Cf. HEINER, *Der kirchliche Zivilprozess,* Köln, 1910, p. 30, coll. p. 32 et 34.

4. As we have said in n° 341, the Roman Tribunal that has to deal with the causes judicially is the S. Rota. To that, then, recourse must be had for causes that have been judicially treated by the episcopal curia, except when the parties consent to settle the matter by common agreement. Judicial proceedings may then be abandoned and recourse had to the S. Congregations for an extra-judicial decision. See the *Collat. Brug.*, t. XIV, p. 286. This common agreement can have no place in matrimonial causes strictly so called, but only in causes relating to betrothment or separation. See LEGA, o. c., IV, n° 417 s.

5. Cf. the *Causa Ravennaten.*, decided in second instance, 29 Dec. 1911 (*A. A. S.*, IV, p. 327 ss.).

6. Here, under 3., we suppose that the judgment in second instance has been pronounced by the episcopal or metropolitan curia. Sometimes, however, it is

343. *Formalities that must be observed for validity.*

Note. 1. It may be asked if the observance of the legal formalities is necessary *for the validity* of the judgment. It would appear that certain formalities must be observed, especially the constitution of the tribunal composed of the three required members, and the intervention of the defender of the bond before the delivering of the judgment. Other points of procedure especially such as concern the drawing up of the documents and the method to be followed are not obligatory for validity, provided the essential elements of the cause are sufficiently presented. However, the Holy See is accustomed, when a cause is referred to it, to confirm the papers of the process, even if some mere formality is wanting, and, if any essential point has been omitted, it requires the papers to be completed before confirming or annulling the judgment. See the *Anal. ecclés.*, 1908, p. 377 s.

2. The *Instructio* of the S. C. de P. F., of 1883, also sets forth, in the second part, various rules to be observed in the procedure, with relation to certain particular matrimonial causes. We refer the reader to the same.

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given by the S. Rota, in case of appeal from the first judgment of the metropolitan curia (see above, 2.). Then, if the decision of the S.Rota confirms the former, « the cause reaches the condition of an adjudicated case, and the only possible recourse is to petition for the quashing of the judgment or the entire re-hearing of the case before the supreme tribunal of the Apostolic Signature » ; « if on the contrary the two decisions are not in agreement, appeal may be made at option from one turn to the following one ». *Lex propria S. R. Rotae*, com. 33. Cf. the *Causa Camerucen.*, in which, at the second turn, 11 Aug, 1910, a decision was given contrary to that of the first (*A.A.S.*, II, p. 961 ss.) and in which, at the third turn, the second decision was confirmed, 23 June 1911 (*A. A. S.*, III, p. 497 ss.). Cf. also the *Causa Colonien.*, 27 Aug. 1910 and 10 June 1912 (*A.A.S.*, II p. 917 ss. and IV, p. 629 ss.).

Part III

DISPENSATIONS AND THE REVALIDATION OF MARRIAGE.

Section I

MATRIMONIAL DISPENSATIONS.

344. Logical arrangement of matter.

Scheme. Whenever there is either a diriment or a prohibitive impediment to a marriage, such marriage must not be entered upon until the impediment has been removed. Those impediments that admit of it are *ordinarily* removed by *dispensation*, as will appear more clearly in the course of this treatise.

Dispensation is said to be the *ordinary* remedy, for there are some impediments that lapse of themselves, such as age, prohibited times, and, for one side also, the bond *(ligamen)*, through the death of the first husband or wife ; while others may be removed by the interested parties themselves, as, for instance, disparity of worship, abduction and the bond consequent on a marriage ratum non consummatum, which impediment lapses on the taking of solemn vows.

But as all these cases, where a prospective marriage is concerned, require no explanation, we have to speak here of dispensation alone, and we shall direct our attention to, firstly, its definition and classification ; secondly, its author ; thirdly, its causes ; fourthly, its petition ; fifthly, its concession and execution ; sixthly, its defects and the method of remedying them.

Chapter I.

DEFINITION OF MATRIMONIAL DISPENSATION.

I. Definition.

345. Definition of dispensation.

Taken in connection with the matter in hand, *matrimonial dispensation* may be defined as an act of lawful authority whereby the effect of a law prohibiting or annulling marriage is suspended in a particular case or for a particular person, while retaining its full force in respect of other members of the society, or in other cases (1).

II. Classification.

364. Its various kinds :

The principal kinds of matrimonial dispensation are :

1. Dispensation for **contracting** a marriage, and dispensation for **revalidating** a marriage **already contracted.** This revalidation is *ordinarily* effected by a *simple* dispensation, and *extraordinarily* by a *sanatio* or *revalidatio in radice*, of which we shall speak more at length in the second section, when treating of the revalidation of marriage.

a) *for the contracting and for the revalidating of a marriage ;*

2. Dispensation **for the external forum** and **for the internal forum.**

b) *for the external and internal fora ;*

A dispensation *for the internal forum*, or *forum of conscience*, is one that holds good, or has the effect of removing the impediment, *in the forum of conscience alone*, and not before the public and external government of the Church ; it must, accordingly, be asked for and granted in such a way that proof of it cannot be produced before the external forum. This is achieved by the employment of fictitious names and by other precautions which will be given in detail below. On the other hand, a dispensation *for the external forum* is valid *directly* before *the public government of the Church*, and for this reason it must be asked for and executed in such a way that the granting of it may be duly proved before the ecclesiastical authority. This is effected by making mention of the names of the parties concerned, and by observing the clauses that will be stated further on. Such a dispensation is *indirectly* valid *for the internal forum also*,

1. See Van den Berghe, *Tractatus de Legibus*, Bruges, 1904, n° 145, who shows how dispensation differs from interpretation of the law, from privilege, from abrogation, and so forth. Cf. also Braudhuber von Etschfeld, o. c., p. 1 s.

so that, when it has been granted, the impediment can be considered as being also removed before God and in conscience, unless it is evident that the external forum is resting on a false assumption ; for this reason it is also called a dispensation *for either forum*.

Observations :

a/ It is clear that dispensation for the external forum *of itself* and *regularly*, concerns impediments that are public *either* by their nature *or* in fact, and that are therefore known as impediments of the external forum ; while dispensation for the internal forum concerns impediments that by their nature *and* in fact are occult, and are called impediments of the internal forum. If there is a *doubt* as to the public nature of an impediment, a dispensation for the external forum must be applied for (1).

Exceptionally it may happen that a dispensation is given for the *internal* forum from impediments that are occult in fact and by nature public, or even occult by nature and public in fact. Thus, when it is a question of a marriage *to be contracted*, a dispensation is sometimes given for the internal forum, and in the form proper thereto, from the impediment of public decency arising from an occult betrothment ; and when it is a question of *revalidating* a marriage already *contracted*, the nullity of which is not publicly known, a dispensation is sometimes granted from spiritual relationship, consanguinity, and lawful affinity in the remoter degrees, when occult in fact, and even from unlawful affinity that is public in fact (2). Cf. below, nos 351, 355, 361 and 376.

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1. We have stated above, in no 235, what is understood by an impediment public by its nature or in fact, occult by its nature or in fact, and what are the impediments that are considered as being public or occult by their nature.

2. Sometimes also, for grave reasons, in case of an impediment public by its nature, or even public by its nature and in fact, with a view to the revalidation of a marriage, the nullity of which is secret, a dispensation for the external forum, and in the form proper to the same, is granted in such a way that it is kept secret in the episcopal chancellery until it can be opportunely published. Also, in a similar case, a dispensation may be given, particularly by a sanatio in radice, according to the form proper to the internal forum, and under fictitious names, but in such a way that, in case of need, it may be used as evidence in the external forum. For this purpose, the letters of dispensation are kept at the episcopal chancellery, with the names of the petitioners written at the foot of the document. On this subject, see the *Collat. Brug.*, t. VI, p. 604 s. ; XII, 119 s. ; cf. also what is said in the second section, nos 408 and 409.

b/ If an impediment, from which a dispensation has been given in the internal forum, comes to the knowledge of the external forum, it is regularly necessary to obtain a fresh dispensation for the external forum. Observe, however, *firstly*, that, « if the impediment, without being as yet public, is known to the Bishop in the external forum, he must refrain from enjoining separation and from instituting proceedings against the marriage, if he knows by secret but legitimate testimony that a dispensation has been granted in the internal forum, for instance, through a statement made by the confessor, who, with the permission of the penitent, has informed the Ordinary of the fact » (1) ; observe, *secondly* that even when the impediment has become public, the dispensation for the internal forum, which is known to have been asked for in good faith, « must be considered as valid in the external forum, and the ecclesiastical judge is neither bound, nor able, to take judicial cognizance of the impediment in question, unless it has been brought before him in due form of law » (2) ; supposing, of course, that there is no common scandal.

c/ The *faculty* of dispensing *for the external forum* is the faculty of granting dispensations for the external forum and in the form proper to the same ; the *faculty* of dispensing *for the internal forum* is the faculty of granting dispensations for the forum of conscience in the form proper thereto ; this latter faculty in accordance with its nature, may be exercised extra-sacramentally, or sacramentally. The *faculty* of dispensing *for either forum* is the faculty of granting dispensations either for the external or internal forum in the form proper to each, according as the impediment in question is public or private.

3. Dispensation is **apostolic, episcopal** or **sacerdotal**, according to the authority granting it. *c) apostolic, episcopal, sacerdotal dispensation :*

4. Dispensation **in gracious form** or **in commissarial form.** *d) in gracious and in commissarial form.*

A dispensation is said to be granted *in gracious form*, when it is executed and applied directly to the petitioners by him who grants it ; it is, on the contrary, said to be granted *in commissarial form*,

1. It is thus stated, in accordance with Benedict XIV, *Instit. eccl.*, 37a, n. 51, by Feye, *De Imp.*, n° 639, 1°. Cf. Putzer, o. c., n° 19.

2. Reply of the Poenitentiaria of July 29, 1891, to the Archbishop of Cambrai ; in the *Collat. Brug.*, t. XI, p. 724 s.

when he who grants it, hands over to another the duty of executing the dispensation and of applying it to the parties. Whence we see that, in this latter case, the favour is not complete at the time of granting, but only when it has been executed by the commissary (1).

Execution of a dispensation is sometimes called *fulmination*, whether made directly by him who grants the favour in gracious form, or by the commissary, in fulfilling the order received in commissarial form. It is, however, the custom to apply the term « fulmination » more especially to execution in commissarial form (2).

The distinction between dispensation *in forma ordinaria* or *in forma nobilium* and dispensation *in forma pauperum*, as far as it still exists under the new constitution of the Roman Curia, is of less importance, and we refer the reader for further details to the *Collat.*, *Brug.*, t. V, p. 671 s.

e) gradus minoris and gradus majoris.

5. Dispensations known as **gradus minoris** and **gradus majoris.**

1. Observe that the Pope, when dispensing *in commissarial form*, « entrusts to the executor two things, viz., *jurisdiction* to examine and ascertain if the petition is in conformity with the facts, and a *simple ministerial power* to impose the penance, absolve, dispense, and legitimate the children ». REIFFENSTUEL, l. c., n° 353 s. Cf. *Collat. Brug.*, t. V, p. 670, 677 ; VI, p. 125 and IX, p. 675.

2. Dispensation in commissarial form must not be confounded with the power to dispense in an altogether particular case that is sometimes granted by the Holy See, as we are reminded by the *Normae Peculiares ex Ordine servando*, cap. III, n^{os} 3 and 4. For sometimes, e. g., for the impediment of mixed religion, or of vow in the external forum, « the supplica is sent to the Ordinary or other ecclesiastic in place of him, with power to grant the favour asked, either in full or with certain restrictions ».

The difference is that, « when the supplica is sent with the powers to the Ordinary, the granting of the dispensation asked for is left to his judgment and conscience, having due regard for the form of the rescript, the matter submitted to the Holy See, and the opportuneness of granting the dispensation » ; on the other hand, « if the rescript is expressed in commissarial form.... the Ordinary cannot refuse to execute it, except in one of the two following cases : if the petition is manifestly vitiated, that is to say, marked by obreption or subreption, or if the petitioner is so unworthy that the granting of the indult would cause scandal and discontent among the people » ; in which case the Holy See must be notified of the fact. As is, indeed, quite obvious, under the first form, the Ordinary dispenses really and properly, while under the latter form he merely causes the favour accorded by the Holy See to be applied and executed

According to the *Normae Peculiares* of the Reformed Curia, c. VII, art. 3, dispensations *gradus minoris* are those granted from the impediments of consanguinity and of licit affinity in the third and fourth degrees ; of illicit affinity in first and second degrees ; of spiritual relationship and of public decency.On the other hand, it is customary to grant dispensations *majoris gradus* for the impediments « of consanguinity in the second degree of the equal collateral line, and also in the first degree mixed with the second or third ; likewise for the impediments of licit affinity in the first and second degree of the equal collateral line, or in the first degree joined with the second or third ; finally, for the impediment of crime arising from adultery with promise of marriage » (nos 19 and 20).

347. *Observations, on the use and interpretation of dispensations.*

Scholion I. Dispensation weakens the force of the law,and therefore the Church wishes that its use should be restricted as much as possible.This is why the Council of Trent, Sess. XXIV, c. 5, *de Reform. matr.*, recommends that « for the contracting of marriage no dispensation should be granted, or only on rare occasions, for a serious reason and as a favour ». The Church, under stress of circumstances, has in our days mitigated that discipline, but nevertheless,parish priests must take this admonition into account and see that they are not too easy in the matter of marriages opposed to the law, and, in particular, that they give no inopportune hope of obtaining a dispensation. Their duty is prudently to discountenance such marriages (1).

It also follows from this that a dispensation *must be interpreted strictly*. On the other hand, *a faculty* to dispense, being a favour, demands a wide interpretation, though this interpretation must be comprehensive and not extensive (2).

348. *Ancient law.*

Scholion II. *Originally*, in Canon Law, every derogation from the law in force came under the term dispensation, which comprised not only a

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1. In this connection,the *Liber Manualis* for the diocese of Bruges says,p. 188 : « As soon as the parish priest hears that a marriage between blood-relations or relations by marriage is in contemplation, especially within the nearer degrees, he shall, as far as he prudently can, make timely efforts to turn the parties concerned from their purpose ».

2. Some applications of this principle may be seen below, in no 362, see also the passages there referred to.

relaxing of the law in a particular case, but also a general derogation and even abrogation. Cf. STIEGLER, o. c., p. 14, p. 40 and 72.

It is not true, though some authors maintain it, that *before the eleventh century* dispensation was admitted only *post factum* and not *ad faciendum*, i. e., for marriages already contracted but not for those in contemplation. The contrary is proved by the letter of St Gregory the Great (590-604) to St Augustine, apostle of England, and by that of Gregory II (715-731) to St Boniface. These two Popes modified, the one for England and the other for Germany, the rigour of the impediment of consanguinity in the case of marriages to be contracted. *Ibidem*, p. 44-46; compare with VILLIEN, *Diction. de Théol.*, col. 1430 ss. ; *Theol. Quartalschr.*, 1913, p. 64 s.

There are some who fall into a yet greater error, in imagining with ESMEIN, o. c., II, p. 316 ss., that the economy of dispensation in force before the eleventh century was the exercise of a *purely disciplinary* power, and that the Church simply refrained from punishing an infringement of the law.

The real *difference* between the economy of dispensation before the eleventh century and that which subsequently existed, is rather to be found in the fact that originally dispensations were ordinarily granted only by way of general *derogation* and for reasons of *public good*, while later they were granted for the *private* advantage of individuals, by derogation *in special cases ;* originally, therefore, we have a question of privileges rather than of dispensations strictly so called. See above, in n° 345.

From the eleventh century the second usage began to prevail, and gradually the idea of dispensation developed into what we now understand by it, viz., a derogation from the law in a particular case. In the Middle Ages, however, the Church very rarely employed it, and only a few instances are recorded ; of these may be mentioned the dispensation granted by Nicholas II (1058-1061) to William, Duke of Normandy, from the impediment of consanguinity, and that granted by Pascal II (1099-1118) to Philip I, King of France, from consanguinity in the sixth degree mixed with the third. In both cases the dispensation was for a marriage already contracted (1).

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1. Cf. WERNZ, o. c., n° 610, where he notes that the first instance of a dispensation in a particular case, *for the contracting of marriage*, was « the indult granted to John, the son of Henry II of England, enabling him to contract marriage with a blood-relation ». Cf. also CHARDON, o. c., p. 446 s., and *Conférences de Paris*, III, p. 287 s., where various cases are given in which dispensation was refused even in the remoter degrees, and where kings and princes were concerned. See also WATKINS, o. c., p. 704 ss.

Chapter II.

THE AUTHOR OF MATRIMONIAL DISPENSATION.

349. What is meant by « Author of dispensation ».

By « Author of dispensation » is meant the person who grants the favour, whether he grants it in virtue of his ordinary power or by delegation ; whether he employs the gracious form or the commissarial form. The mere executor of a dispensation in commissarial form can in no way be called the author of it ; he is merely an instrument employed by the granter of the dispensation for the purpose of applying it to the person concerned. Matrimonial dispensations have for their author the *Sovereign Pontiff* with the Roman Congregations, the *Bishop* or Ordinary, and also the *priest* ; of these we shall speak successively.

Article 1. The Roman Pontiff and the SS. Congregations.

350. Dispensing power of the Sovereign Pontiff.

I. The power of the **Sovereign Pontiff** in dispensing from matrimonial impediments :

1. Extends to all impediments of *ecclesiastical law* established by his predecessors or by conciliar canons. Such are : mixed religion, the Church's prohibition, prohibited time, condition, impuberty, abduction, vow (in so far as it constitutes a diriment impediment), Orders, disparity of worship, consanguinity (within the limits laid down above), affinity, spiritual and legal relationship, public decency, crime, clandestinity. The power of dispensing, in fact, goes hand in hand with that of legislating and has the same extent.

2. With regard to impediments *of the natural and divine law* : the Pope cannot dispense from impediments of natural-divine law, *absolute and independent of the acts of man*, e. g., from consanguinity in the first degree of the direct line ; but there is no reason why, in virtue of his ministerial power, he should not dispense from certain impediments established by the secondary natural or divine law *consequently on the act of man* (1). Of such a kind are : the pro-

1. See hereon, nos 172 and 183, where we show that the Church can, *in virtue of its ministerial power*, dissolve betrothment and vows, and consequently relax the prohibition resulting from them with regard to marriage ; that it can even dispense from indissolubility in the case of a marriage that is not at the same time ratum and consummatum.

hibitive impediment of vow, and the diriment impediment of *ligamen*, arising from a marriage that is not at one and the same time ratum and consummatum (1).

Observe, however, that the Roman Pontiff does not, as a matter of fact, make full use of his power. There are some impediments from which he could dispense, but which he hardly ever removes. Such are : lawful affinity in the direct line, particularly in the first degree, clandestinity in the case of a marriage to be contracted, the impediment of crime when the murder is public, Order of priesthood and especially of episcopacy ; only with very great difficulty is dispensation obtained from solemn profession. For the rest, what has been said with regard to each of these impediments may be consulted.

The Church never dispenses, moreover, in case of doubt as to the existence of an impediment *of absolute natural-divine law*, whether the doubt is one *of law*, as in the impediment of violence and fear, and in that of consanguinity in the first degree of the collateral line or in the direct line beyond the first degree, or whether the doubt is one *of fact*, as in the case proposed to the C. S. O., 6 April 1906 (2).

351. Power of the SS. Congregations :

II. For granting dispensations, it is the custom of the Sovereign Pontiff to make use of the **Sacred Congregations.** They are his ordinary intermediaries in conceding such favours. According to the new economy, introduced by the Constitution, *Sapienti Consilio* (3), and in force from the 3 November 1908, the following Congregations are deputed for this office :

for the internal forum,

A. **For the internal forum** : the competent authority is the *S. Poenitentiaria*, to which it pertains, as before, to dispense for the forum of conscience : a/ from all impediments, whether diriment or prohibitive, *occult by their nature and in fact*, and from public decency arising from occult betrothment (4), in each case *for marriages contracted and to be contracted ;* b/ for the purpose of revalidating a marriage *already contracted :* from the *third and fourth* degree

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1. We have also seen, nº 31, by what right the Church has the power of removing the impediment arising from betrothment.

2. *Collat. Brug.*, t. XII, p. 777 s. ; see above, nº 300.

3. See above, nº 221.

4. See above, nº 346.

of *consanguinity and of licit affinity* when these are occult in fact, and also from the *second* degree, if « this impediment has remained occult for at least ten years, and if the petitioners have married and lived together openly, and have passed as lawful husband and wife » ; finally, from *spiritual relationship occult* in fact. BENEDICT XIV, Constit., *Pastor Bonus*, 13 April 1744 (*P. Bull.*, II, par. 39 s.); and compare with *Instit. Eccl.*, 87, nos 7 and 11. Cf. also GASPARRI, o. c., I, n° 322 (1).

B. **For the external forum :**

1. For the countries and the faithful *of the Oriental Rites* : *Congregation for the Affairs of the Oriental Rites* (2). *the for the external forum.*

2. For the countries and the faithful *of the Latin Rite* :

a/ *The Congregation of the Holy Office ;* to which it belongs to dispense from disparity of worship and from mixed religion (3).

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1. Cf. *Collat. Brug.*, t. XIV, p. 426 s., where the *judicial* power which also belongs to the S. Poenitentiaria in the internal forum is defined.

2. According to the *Normae Peculiares*, ch. VII, art. VI, n° 4, « The Congregation de Propaganda Fide will keep intact its powers with regard to the affairs of the Oriental Rite », i. e., the very important powers entrusted to it by Pius IX in the Constitution of 6 Jan. 1862 (*Collectan.*, n° 13) ; it retains, therefore, *in relation to the faithful of the Oriental Rite*, its competence to dispense from *all* impediments of the *external forum*, even from mixed religion and disparity of worship ; the only exception is the Pauline privilege, which is exclusively reserved to the Holy Office. Thus also the Consistorial Congregation, 12 Nov. 1908, when asked « if the Congregation for affairs of the Oriental Rites could for the future grant matrimonial dispensations from mixed religion and disparity of worship », answered : « Affirmatively, except in the case of the Pauline privilege, which belongs to the Congregation of the Holy Office ». *Acta Apost. Sed.*, I, p. 149 s. Cf. *Collat. Brug.*, t. XV, p. 252.

3. The Holy Office still keeps, as noted above, the power « of taking cognizance of cases connected with the Pauline privilege ». Further, the Holy Office having laid before the S. Congregation of the Consistory a doubt as to its own competence, 27 March 1909, His Holiness ordained, 15 Feb. 1910, in accordance with the votum of the S. Congregation of the Consistory, « that, for the future, all questions connected with mixed marriages should be submitted to the Holy Office » ; it is therefore necessary to submit to it all doubts, of law and of fact, concerning mixed marriages (understanding thereby both cases of mixed religion and of disparity of worship), even doubts that relate to marriages mixed on some other ground, particularly on the ground of the application of art. XI of the Decree *Ne Temere ;* although the Holy Office always has the right, « if it thinks it advisable and the case admits of it, to refer the question to some other department ». *Acta Apost. Sed.*, II, p. 56 ; cf. MONIN, o. c., p. 226 and p. 229. *Collat. Brug.*,

b/ *The Congregation for the Affairs of the Religious Orders,* which dispenses from the *vow of chastity* « *religious of both sexes* bound by solemn or simple vows, as well as those who, though without vows, live together in common like religious » (1).

c/ *The Congregation of the Discipline of the Sacraments* (or *de Sacramentis)* ; to which pertain all other impediments *of the external forum,* for the poor as well as for the rich (2).

Observation. 1. The competence of the S. Poenitentiaria and that of the Holy Office extend *to all countries of the Latin Rite,* including those subject to the S. Congregation de Propaganda Fide. This is true also of the competence of the S. Congregation for the affairs of Religious, in the matter of the vow of chastity (3), and of that of the S. Congregation of the Sacraments « in what concerns *marriage* » (4).

2. « Though, in consequence of the repeal of the accumulated powers held by the Roman Congregations and Tribunals, each matter has its appointed place, nevertheless, in particular cases,

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t. XV, p. 251 ss. and above, nos 341 and 342. See also the decree of the Holy Office, of 21 June 1912, in the *A. A. S.*, IV, p. 443 s., and compare with the *Collat. Brug.*, t. XVII, p. 561 and 564.

1. Constitut. *Sapienti*, I, art. 5, no 1 ; cf. *Collat. Brug.*, t. XIV, p. 375.

2. To the same Congregation are assigned « revalidations in radice, dispensation from marriage ratum, separation of husband and wife, restitutio natalium or legitimation of children ». With regard to *dispensation from a marriage ratum,* the granting of the dispensation belongs to this Congregation, but the preliminary judicial inquiry, to ascertain if the marriage has or has not been consummated, pertains to the S. Rota. The S. Congr. of the Sacraments can of itself, and without being empowered to do so by a decree of the Holy See, at the close of the inquiry as to the consummation of the marriage, refer to the Rota causes of this kind submitted to it in first instance. The Congr. of the Consistory makes a declaration to this effect, 19 Jan. 1909 ; *Acta Ap. Sed.*, I, p. 211 s.; cf. *Collat. Brug.*, t. XIV, p. 372, compare with what has been said in the note to no 341.

3. Religious, in countries subject to the Propaganda, depend on this Congregation as missionaries and as regards their sacred ministry ; but they depend on the Congr. for the affairs of Religious in all that concerns the religious life.

4. *Normae Peculiares,* c. I, no 1, where it is added : « Concerning the *other* sacraments, its competence (i. e., of the Congr. of the Sacraments) is limited to countries *subject to the common law* ». In other countries the S. C. de P. F. exercises its jurisdiction over the other sacraments, and continues to be the intermediary for matrimonial affairs that have to be dealt with by the Congr. of the Sacraments or by the Holy Office.

doubt and error may occur. Under such circumstances, it must be remembered that the former law is still in force, prohibiting anyone, when once a petition has been presented to a department and accepted by it, from applying, of his own accord, for the same purpose to some other department. In this case, the consent of the Office that has the matter in hand, or a decree of the Consistorial Congregation authorising the transfer of the cause must be obtained. Any concession coming from another Office, contrary to the law given above, shall be null ». *Normae pecul.*, c. I, n° 2.

3. With regard to the *procedure* followed by the said Tribunals, the Holy Office and the S. Poenitentiaria follow that formerly in use, while, for the Congregation of the Sacraments, various rules have been drawn up, which may be found in the *Normae Peculiares*, c. VII, art. 3. (1).

Scholion I. It has been established by the Constitution, *Vacante Sede Apostolica*, of 25 Dec. 1904, that the *ordinary* powers (2) of the Congregations do not expire at the death of the Pope. It is, however, the will of the Sovereign Pontiff that the Congregations shall use such ordinary powers only in matters *of minor importance*, and that they shall reserve for the future Pope the more grave and

1. The granting of matrimonial dispensations which can be easily given and afford no room for doubts or particular difficulties, (which difficulties are to be laid before the full Assembly) (n° 11), belongs to the *Congressus* or Committee of principal administrators, composed of the Cardinal Prefect, the Secretary and three undersecretaries. Dispensations *gradus minoris* are granted by the *Undersecretary of Dispensations* or by his assistant; dispensations *gradus majoris*, by the Cardinal Prefect or by the Secretary (n° 17).

« Matrimonial dispensations of every degree, regarding impediments that are by their nature honest, will be forwarded by means of a document *in the form of a Brief*, but drawn up at the office of the secretary of the Congregation, if such dispensations are subject to the higher taxation. Other dispensations will be sent *under the form of a rescript* » (n° 13). Cf. *Collat. Brug.*, t. XIV, p. 347. With regard to the sense of the forms ordinarily employed in Roman replies, see *N. R. th.*, 1911, p. 588 ss.; Parathoner, *Der Geschäftsverkehr mit der Römischen Kurie*, in the *Th. Pr. Quartalschr.*, 1912, p. 744 ss.

2. « Sede vacante, they cannot, however, deal with questions that they have no power to dispose of, when the See is occupied, except *facto verbo cum SS^mo*, or *ex audientia SS^mi*, or *in virtue of special and extraordinary faculties*, which the Pope is accustomed to grant to the Prefects or secretaries of the said Congregations ». *Collat. Brug.*, t. XIV, p. 438.

debatable cases, so far at least as their solution admits of delay (1).

Principal modifications introduced in 1908.

Scholion II. As is clear from what has been said, the rules affecting dispensations have been considerably *modified* as regards recourse to the Holy See. The power of dispensing has been entirely taken away from the Dataria Apostolica, to which the office of dispensing for the external forum hitherto chiefly belonged ; in like manner, the Congregation of the Propaganda, the Secretariate of Briefs and the Congregation for Extraordinary Affairs have been deprived of their powers. Moreover, the competence of the S. Poenitentiaria has been restricted to the *internal forum*, and it loses the power, that it hitherto provisionally possessed, of dispensing for the external forum in the case of the poor and quasi-poor (2). Subject to the reservation of the powers of Holy Office, of the Congregation of the Oriental Rites and of the Congregation of Religious, the new Congregation of the Sacraments has competence in respect of all matrimonial dispensations *of the external forum*.

For the law formerly in force, see BANGEN, *Die Römische Curie*, Münster, 1854 ; HILLING, *Die Römische Kurie*, Paderborn, 1906 ; GRIMALDI, *Les Congrégations Romaines* (on the Index), Siena, 1890.

ARTICLE 2. The Bishop and Ordinary.

352. What is meant by « Ordinary ».

Preliminary observations. 1. *Ordinary* is not strictly synonymous with *Bishop*, though the terms are often employed indifferently. The Encyclical Letter of the C. S. O., 20 Feb. 1888 (*Collectan.*, n° 1471), tells us that « under the name of *Ordinary* are understood Bishops, Administrators or Vicars Apostolic, Prelates or Prefects having jurisdiction over a distinct territory, their officials or Vicars-General in spiritualibus, and, when a see is vacant, the Vicar Capitular or legitimate Administrator ».

Distinction

2. As we shall presently point out, Bishops can dispense either

1. Cf. *Collat. Brug.*, l. c.

2. Owing to this last change, which entrusts to the same Congregation the charge of dispensations for rich and poor alike, there is no longer need to trouble about the famous distinction between *rich*, *poor* and *quasi-poor*. The matter is now to be taken into account only for the purpose of determining the tax to be imposed, of which we shall speak later, and this distinction cannot for the future affect the validity or nullity of the dispensation, as is expressly stated by the *Normae Communes*, c. XI, n° 3 : « In no way, however, shall error or fraud as to the pecuniary position of the petitioner injuriously affect the validity of the dispensation ».

in virtue of their *ordinary* power or in virtue of a *delegated* power.

between a Bishop's ordinary and delegated power.

The *ordinary* power of a Bishop is the power proper to his charge and inherent in the episcopal office, so that the Bishop of the see exercises it with full right and in his own name. *Delegated* power is that which does not belong of right to the Bishop and is not inherent in his office, but is entrusted to him by a special mandate ; the Bishop does not exercise it in his own name, but as the delegate of the Pope.

Observe that the distinction between ordinary power and delegated power consists in this, that the *former* is the *proper* power of the Bishop, who exercises it *in his own name and in virtue of a right attaching to his office,* while the latter *is not proper to him and must be exercised in the name of another*. Thus, a power does not cease to be ordinary because it does not flow spontaneously from the episcopal office, but from the higher authority of Pope or Council, provided that it is attached to the episcopal office as a property of it and is inherent in it. On the other hand, a power does not cease to be delegated because it is granted to a Bishop in perpetuity, even if this is done in virtue of his office and not as a personal favour, provided such power is not inherent in the office itself and is to be exercised in the name of another. Such is the power granted to all Ordinaries of dispensing in favour of concubinarii, when at the point of death ; this power is, in truth, perpetual and granted in virtue of the office, and yet it remains delegated and must be exercised by Bishops in their capacity as delegates of the Holy See (1).

Explained thus, the bipartite division of the episcopal power appears complete, and there is no room for a third kind of power, known as quasi-ordinary (2).

We have, therefore, to define the limits of each kind of power, considering, firstly, its *object*, secondly, the *subject* in favour of whom the Ordinary can dispense, and, thirdly, the *nature* of the power and the *principles* that ought to regulate the exercise of it.

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1. It is the same with the power granted to Bishops, as delegates of the Holy See, to take certain proceedings against those of the faithful not subject to their jurisdiction. See *Collat. Brug.*, t. V, p. 475.

2. In the *Collat. Brug.*, t. V, p. 474, a tripartite division is proposed.

Paragraph I. OBJECT OF THE BISHOP'S POWER.

First point. Object of the ordinary power.

353. Source of ordinary power of dispensing in the case of the Bishop.

The Bishop, in virtue only of the power *that flows spontaneously from his office,* can no more dispense than legislate in the matter of matrimonial impediments *of common law*, whether diriment or prohibitive, but only in the matter of prohibitions that are of the *particular law,* such as the celebration of marriage during the forbidden times, and episcopal prohibitions. Nevertheless, *in virtue of an express or tacit concession of the law or of the Holy See,* a certain power of dispensing in the matter of impediments of common law is annexed to the episcopal office, in the character of ordinary power (1).

A. In relation to diriment impediments.

354. 1° He can dispense from diriment impediments: a) for a marriage already contracted,

1. To **revalidate** a marriage **already contracted**, the Bishop can, *in virtue of the tacit consent of the Pope*, dispense from diriment impediments, provided, a/ that the marriage has been contracted in good faith, b/ publicly and without wilful omission of the banns, c/ that there is danger in delay, d/ that it is a question of impediments occult at least in fact, and e/ such as the Church is accustomed to dispense from.

According to Schmalzgrueber, *in lib. IV Decret.*, tit. XVI, n. 80, « The *reason* of this is, 1. that... the Bishop can, in extraordinary cases, when there is urgent necessity, danger in delay, and recourse cannot easily be had to the Pope, dispense from other Papal laws in virtue of the presumed will of the Pontiff. 2. Moreover, in the matter of which we are speaking, it is very important for the good of souls that Bishops should have the power of dispensing, and this is practically necessary for the avoiding of grave sins ; consequently, it is not likely that the Pope would wish to refuse this power to Bishops. 3. Finally, usage and custom, especially when of long standing, are the best interpreters of laws and

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1. For the historical evolution of the law in this matter, see Stiegler, o. c., p. 312 ss., and Braudhuber, o. c., p. 26 ss. ; this latter shows how the Holy See has progressively reserved to itself the power of dispensing. Villien, in the *Canon. Contemp.*, 1903, p. 534 ss., gives an historical exposition, showing how the Bishops subsequently received an ordinary power over occult impediments, wihtin the limits that we shall presently describe.

canons, and it is certain that the Doctors commonly attribute this power to Bishops, who make use of it with the knowledge of the Pope, and without any protest on his part » (1).

As to the *conditions* required, it is necessary :

a/ That the marriage be contracted *in good faith.* Authors commonly require this condition, in virtue of the Council of Trent, Sess. XIV, cap. 5, *De Reformat. matrim.*, which ordains that « if anyone shall *knowingly* presume to contract marriage within the forbidden degrees, he shall be separated, without hope of obtaining a dispensation ». What the Council says of those who knowingly marry, notwithstanding the impediment of consanguinity, is applied rightly, and for the same reason, to the other impediments ; the motive giving rise to this sanction holds good for them also, viz., that the Church should not favour the malice and perverse audacity of the contracting parties (2). *provided it has been contracted in good faith,*

It is sufficient, however, that there should be good faith *on one side ;* for this refusal of a dispensation is a penalty that it would be unjust to inflict on an innocent person for the delinquency of another. Good faith in this case comes from ignorance of law or of fact, according to the teaching of Benedict XIV, l. c., and not only from a vincible ignorance, but also from a crass, careless (supina) and even, according to some, affected ignorance, since the penalty is enacted only against those who *knowingly* contract in defiance of the law. Cf. *Collat. Brug.*, IV, p. 38 s. ; Sanchez, l. c.

b/ That it has been contracted *with all the prescribed formalities,* that is to say, in the presence of the priest, where that was possi- *and with the required formalities ;*

1. Schmalzgrueber cites numerous authors in support, n° 79 ; to whom may be added those, no less numerous, cited by the *N. R. th.*, XIV, p. 524, in a note, among them, Benedict XIV, *De Syn. dioeces.*, l. IX, c. II, n° 1, whose authority is of the greatest weight in this matter (witness the decree of the C. S. O., 3 Aug. 1878, which refers to him). See *N. R. th.*, XV, p. 399 s. The S. C. C. also favours the doctrine set forth, in the *Causa Ægitanien.*, 19 Apr. 1692 ; see the text of this reply in Feye, *De Imp.*, n° 364.

2. Cf. Schmalzgrueber, l. c., n° 81 ; Sanchez, o. c., l. II, disp. 40, n° 4 ; Reiffenstuel, *Append.*, n^os 57-59 ; *Collat. Brug.*, t. V, p. 557, where it is stated that the opinion which now affirms that, by reason of the more indulgent attitude of the Church, there is occasion for using this power even for the revalidation of a marriage contracted *in bad faith*, is somewhat unsafe, but not altogether improbable.

ble,even in the case of marriages not subject to the law of clandestinity, and (apart from a dispensation) without knowingly omitting the required proclamations ; should it be otherwise, good faith would hardly be present, and, besides, those who omit these proclamations are, by the decision of the Council of Trent, liable to the same penalties as the preceding.

provided also that there be danger in delay,

c/ *That there be danger in delay*, which is the case, if, on the one hand, the parties cannot be separated without danger of scandal or disgrace, and if, on the other hand, recourse cannot be had to the Holy See, without there arising in the interval, for one or the other of them, danger of incontinence from living together as brother and sister (1). If both the parties contracted in good faith, we are assuming that one of them has subsequently become aware of the nullity of the marriage ; for, if they are both in good faith,they may be left in it, at least till such time as a dispensation has been obtained (2).

and that the impediment admit of dispensation,

d/ That it be an impediment *from which the Pope is accustomed to dispense* ; for, if it be otherwise, it would be unreasonable to presume that the Holy Father intends to grant Bishops a power that he himself is unwilling to exercise.

e/ That it be *occult*.

and that it be occult ;

Bishops must be entirely denied ordinary power, in virtue of the tacit or presumed will of the Pope, to dispense from diriment impediments that are *public in fact* or that must shortly become so, *no matter how urgent the need may be*. This doctrine, formerly called into question by some, has been confirmed more than once by express declarations of the Holy See. Cf. the documents cited by PLANCHARD, *Dispenses*, n° 94 ; by the *N. R. th.*, XIV, p. 526-528 ; by FEYE, *De Imp.*, n° 634 ; by GASPARRI, o. c., n^{os} 408-409, and by

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1. The question of expense hardly comes in here at all, and, except as a thing of the past, there is no longer need to cite the case that authors, as Benedict XIV, l. c., formerly proposed, viz., « that in which recourse could not be had to the Holy See solely on account of the poverty of the petitioner ; since the confessor or the parish priest can himself easily obtain the dispensation from the S. Poenitentiaria by letter, the cost of which is very trifling ». THEOL. MECHL. o.c., p. 407 ; FAGNANUS had already noted this, o. c., cap. *Nimis*, n° 27.

2. Thus think, and rightly, it seems, FEYE, *De Imp.*, n° 635, 1°, and GASPARRI, o. c., I, n° 408. The *N. R. th.*, XXIV, p. 330-332, maintains the contrary opinion, relying on the silence of Benedict XIV.

GENNARI-BOUDINHON, *Consultations-Morale*, Cons. CXXVII, n° 11.

In this case it is also the easier to await the dispensation from Rome and effect the separation without disgrace or scandal, since the nullity of the marriage is supposed to be publicly known ; and even, as SCHMALZGRUEBER adds, l. c., n° 82, « if in such a case the Bishop did dispense, he would rather provoke than avoid a scandal » (Cf. REIFFENSTUEL, *Append.*, n° 43). If, in articulo mortis, for reasons of conscience or for the legitimation of offspring, urgent necessity should arise for contracting a marriage against which there exists some public impediment, provision is made for such a contingency by the special powers granted in 1888 and 1909, of which we shall speak in n^{os} 358 and 369.

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2. For a marriage **to be contracted**, Bishops, in virtue of the same tacit consent of the Holy See, can dispense *in case of urgent necessity*. *b) for a marriage to be contracted,*

Urgent necessity exists, when the circumstances are such that, after every effort has been made, it is found impossible, without scandal or disgrace, to put off the marriage long enough to admit of recourse to Rome (1). A space of three weeks may be considered as necessary for obtaining, *with certainty*, a dispensation from the Holy See, though as a matter of fact, rescripts are now frequently received more quickly (2). *in an urgent case ;*

In proving our statement, we may pass over the arguments adduced by SANCHEZ, o. c., l. II, disp. 40, n° 7, and confine ourselves solely to analogy with the power that Bishops have in relation to marriages already *contracted* ; for here, as in a contracted marriage, the same reasons exist for presuming that the Pope tacitly grants

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1. This case would occur, if « for the legitimation of his children, a man, at the point of death, wished to marry their mother, and could not do so without a dispensation, owing to some occult diriment impediment ; or again, when, before the marriage and after all the preparations have been made, one of the parties makes known in confession an occult diriment impediment, arising from some offence, the revelation of which would cause great disgrace, and the marriage cannot be broken off, or delayed until a dispensation has been obtained from Rome, without probably causing people to suspect that some occult crime has been manifested in confession ». SCHMALZGRUEBER, *in lib. IV Decret.*, tit. XVI, n° 84.

2. See *Collat., Brug.*, t. XIII, p. 405 ; *Archiv f. k. Kirchenr.*, 1902, p. 493, in note.

that power of dispensing, which he certainly would not refuse were he asked for it. Cf. St. ALPHONSUS, l. VI, n° 613.

Moreover, the opinion that attributes this power to Bishops is at the present time *common and certain*, and is maintained by a great number of Authors, following SANCHEZ, l. c. ; many of them are mentioned in the *N. R. th.*, XIV, p. 525, in a note, in FEYE, *De Imped.*, n° 604, in a note, and in GASPARRI, o. c., I, n° 409 (1).

The S. Poenitentiaria, it is true, has never expressly approved this doctrine, but it has been careful to say nothing in disparagement of it. See GASPARRI, l. c., n° 409. In like manner, the C.S.O., when questioned on the subject, would neither approve nor reprehend this opinion in its decree of 23 Apr. 1890. Cf. *N. R. th.*, XXII, p. 490-494.

provided the impediment be occult, at least in fact, as above ;

Observation. a/The condition imposed for the exercise of this two-fold ordinary power, namely, that the impediment must be *occult*, is to be understood in the following way : the Bishop must be recognised as *certainly* possessing this power, when the impediment is occult *at once by nature and in fact*, and it must as certainly be denied him, at least in respect of a marriage to be contracted, when the impediment is public at once by nature and in fact (2) ; if the impedi-

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1. If BENEDICT XIV, *De Syn. dioec.*, l. IX, c.II, n° 2, and *Instit. eccl.*, 87, n° 22, at the end, seems rather to favour the adverse opinion, it is not that he calls the principle in question, but finds it hard to admit, apparently, that an urgent necessity ever exists. He regards as hardly possible « that simultaneous occurrence of circumstances, imagined by Sanchez, in which the marriage cannot be put off without scandal, since there is never wanting a multitude of other reasons... for postponing a wedding, without giving rise to any suspicion of wrongdoing or bringing dishonour on those who were already on the point of marrying ».

But, in our days at least, the means suggested for avoiding dishonour would most frequently prove somewhat unpractical and ineffective. FEYE, *De Imp.*, n° 636, gives them and disapproves of them in practice, « for instance, a temporary vow of chastity taken by the guilty party for the time necessary for obtaining a dispensation ; a journey ; a not untruthful pretext of indisposition ; celebration of the marriage on condition that the Pope grants a dispensation ; a statement by the parish priest to the effect that the Ordinary has forbidden the celebration of the marriage ».

2. Assuredly, as we have remarked in n° 354, whether in the case of a marriage already contracted or of one to be contracted, there will rarely be urgent necessity in the case of an impediment public in fact, and especially of one public by nature and in fact. There is related, however, in the Life of St Peter Fourier

ment is *public by nature* and occult in fact, the Bishop's power is undoubtedly less certain, but there are sufficiently strong arguments in his favour to enable him to exercise it with safety, at least within the limits of the powers granted to the Cardinal Grand Penitentiary, for the internal forum, as we have seen in n° 351.This latter can dispense,in the case of a prospective marriage, from the impediment of public decency arising from occult betrothment, and further, in the case of a marriage requiring to be revalidated (the nullity of which is not known), from spiritual relationship, from consanguinity and legitimate affinity in the third and fourth degrees and even, under certain conditions, in the second degree. Cf. *Collat. Brug.*, t. VIII, p. 132 ss. and 513 ; t. X, p. 130 s., and t. V, p. 359 ss. ; in this last place an account is given of the whole controversy. See also GENNARI-BOUDINHON, *Consultations-Morale*, cons. CXXVII, n° 12 (1).

b/ Just as a Bishop can, in a case of urgent necessity, dispense from occult impediments from which the Holy See is accustomed to dispense, so he can, for the same reason, and in virtue of the same ordinary power, *revalidate a dispensation obtained from Rome*, when the same is invalid owing to some *occult* defect. Cf. PLANCHARD, *N. R. th.*, XV, p. 653-655 ; POMPEN, o. c., n° 115.

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3.A Bishop can dispense in virtue of ordinary power from impediments that are **doubtful** *by a doubt of fact*, at least where *occult* impediments are concerned. *c) and in case of doubt as to the existence of the impediment.*

In a doubt *of law*, since it is a question of ecclesiastical law,

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(*S. Pierre Fourier*, Desclée, Lille, 1897, p. 187 s.), a remarkable fact regarding the Cardinal Duke of Lorraine. He, under the urgent necessity of not permitting his race, which was the royal race, to be extinguished, was forced to contract marriage without delay with his first cousin. As he was a Bishop, though not in sacred Orders, he dispensed himself from the impediment of consanguinity in the second degree, celebrated the marriage, and asked of the Holy See confirmation of the act.

1. Cf. *ibidem*, n° 13, where this Author recognises the Bishop as having the power for the case in which the impediment is *materially* public in fact, though formally occult, relying for this on the reply of the S. C. C., 28 Jan. 1881. It should be noted, however, that recourse must be had to the Holy See, whenever a dispensation for the internal forum has been granted by a Bishop from an impediment public by nature (or materially public in fact), for the purpose of obtaining a dispensation in the external forum, at least ad cautelam.

there is no need of a dispensation, but only of a declaration, for in such a case the Church supplies, so far as an impediment exists ; but in a doubt *of fact* as to an *occult* impediment, the opinion that recognises the Bishop as having the right to dispense is a safe one (1). On the contrary, in a doubt *of fact* as to a *public* impediment, in practice, recourse to the Holy See must be recommended, though theoretically it might, perhaps, be maintained with some probability that the Bishop's power extends even to that (2).

The Holy See has not explicitly recognised the Bishop's power to dispense from doubtful impediments, but when the question was put, it replied, in the decree of 1852, by referring the questioner to the approved Authors ; but Authors generally recognise this power, at least with the restrictions indicated. The decree of the C.S.O., of 3 Aug. 1873, cited above in n° 354, also favours it, since, by limiting the controversy (concerning the Bishop's ordinary power in virtue of the presumed will of the Pope) to impediments that *certainly* exist, it insinuates that Bishops possess ordinary power as to *doubtful* impediments.

B. **In relation to Prohibitive Impediments.**

357. 2° *He can dispense from prohibitive impediments, not reserved to the Holy See ;*

In virtue of an express concession of the right, or of a tacit consent on the part of the Holy See, the Bishop can :

1. Dispense from the prohibitive impediments of common law, **dispensation from which is not reserved to the Holy See.** *Those thus reserved* are the impediments of mixed religion (3), of betrothment, of the simple vow of perpetual chastity (to which is assimilated the vow of entering a religious order properly so called) (4), and of the temporary vow made in a Congregation approved by the

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1 Cf. WERNZ, o. c., n° 610, and the passages cited ; he, however, cites the reply of the S. C. C., 8 Sept. 1852, recommending recourse to the Holy See for greater security, « in cases of *grave* doubt ».

2. Thus GENNARI, *Consultations-Morale,* cons. LXXIV ; also BOUDINHON, *Rev. du cl. fr.*, t. 61 (1910), p. 94 s., recognise the Bishop as having the right of dispensing in respect of the impediment of disparity of worship, doubtful on account of a doubtful baptism. It would seem rather that the case is one for the application of the doctrine explained above, in n° 290. Though it might still hold also for the power of the Bishop in doubtful cases of public impediment, within the limits that we have just laid down in n° 355.

3. Cf. BENEDICT XIV, *De Syn. dioec.*, l. IX, c. 3, n° 2.

4. Decree of the C. S. O., 18 Aug. 1897, ad 2m ; in the *N. R. th.*, XXX, p. 197 s.

Holy See (1), the impediment of prohibited time, in so far as it forbids the solemnities of marriage (2) ; as to the impediment arising from absence of parental consent, the Holy See itself never dispenses from it. The Bishop has, therefore, without prejudice to his power over impediments of particular law, ordinary power to dispense from the *banns* (3), from *vows* of celibacy, of taking Orders, of entering a religious order not strictly so called, and, saving the exception of which we have spoken above, from the simple vow of temporary chastity or from a vow of chastity that is imperfect for any reason whatever (whether on the part of the act or of the matter).

That a vow of chastity may be perfect, *on the part of the matter*, besides being perpetual, it must also take in the whole field of the virtue of chastity ; that it may be perfect *on the part of the act*, the person must have taken the vow absolutely (4) and determinately, with full liberty, with perfect knowledge, and as a grave obligation.

and from reserved impediments, in case of doubt, or partially at least, in case of urgency.

2. As to the impediments **reserved** to the Holy See, especially betrothment, mixed religion, the vow of perfect and perpetual chastity or of Religion (5), and the vow of temporary chastity taken in a Congregation approved by the Holy See :

a/ The Bishop can dispense from them *in case of doubt*, in accordance with what we have said in the preceding n°.

b/ *In case of urgent necessity*, in virtue of the presumed will of the Church, he can also dispense from *the simple vow of perfect chastity*, provided it has been taken privately and is occult in fact ; he can do this in view of a prospective marriage, or for the purpose of

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1. Constit. *Conditæ*, ch. II, art. 2. Cf. VERMEERSCH, *De Religiosis*, II, p. 140 ; BASTIEN, *Directoire canonique*, Maredsous, 1904, n. 199 ss. ; *Irish Eccles. Record*, 1913, p. 417.

2. Decree of the Propaganda, 21 July 1841, ad 2 m, *Collectan.*, n° 1551.

3. Council of Trent, S. XXIV, c. I, *De Ref. matr.*

4. A *conditional* vow is certainly not reserved so long as the condition remains unfulfilled ; it is doubtful if it is so at the time when the condition is realised. Notwithstanding the authority of many authors, including St. Alphonsus, l. III, n° 261, we are of opinion that a conditional vow is reserved to the Holy See after the condition has been fulfilled. See also LOISEAUX, *Traité canonique et pratique du Jubilé*, Tournai, 1859, p. 492 ss.

5. We do not speak of the *prohibited time*, because on the one hand this impediment can hardly be doubtful, and on the other hand there can never be urgent necessity for the solemnities of marriage.

permitting the use of a marriage already contracted ; for what we have said in nos 354 and 355 with regard to diriment impediments is applicable to this impediment, as being occult by nature and in fact.

With regard to the vow of chastity taken in private but public in fact, and the other reserved prohibitive impediments, public by nature, such as betrothment, mixed religion, and the vow of chastity taken in a religious order, the most common opinion denies generally that Bishops have ordinary power of dispensing, in virtue of the presumed will of the Church,alike in the case of a public diriment impediment, and in that of a prohibitive impediment of the same kind (1).

A special difficulty, however, occurs here in case of *danger of death*. On the one side, there may then be urgent necessity for celebrating marriage in order to settle matters of conscience or for the legitimation of offspring, and, on the other side, the powers granted in 1888 in favour of the dying extend only to diriment impediments. This is why many authors (2) admit that, under these circumstances, the Bishop can dispense, even when it is a question of a public case, and they say that the presumed consent of the Church extends to this, by exception and notwithstanding the general rule. In support of their opinion they appeal to the provident solicitude of the Church, which permits the Bishop to dispense, in favour of the dying, even from diriment impediments, both public and occult, and also to the decree of the C. S. O., of 3 Aug. 1873 (*N. R. th.*, XV, p. 399 s.) (3). Nevertheless, there seems to be a difficulty in having recourse to the presumed will of the Church, when that will has been clearly expressed in the contrary sense, as in the Indult of 1888, which,

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1. Cf. Giovine, o. c., II, p. 290 s. ; Feye, *De Imped.*, nos 613 and 635.

2. De Becker, *De Matr.*, p. 280 ; Gennari-Boudinhon, o. c., 2a P., *Droit canonique*, consult. 71 ; *N. R. th.*, XV, p. 519 ss. ; XXVI, p. 284 ; XXXV, p. 315 ss. ; *Rev. th. fr.*, 1898, p. 667 ; *Collat. Namurc.*, t. IV, p. 345.

3. We read there : « Though in relation to the impediment of mixed religion, pressing danger of death might (perhaps) make the dispensation lawful... » ; nevertheless, this decree recommends the asking of an indult. Thus, in 1903, the C. S. O. granted the Ordinary of Strasburg an indult to dispense from mixed religion in favour of dying concubinarii. *Canon. Contemp.*, 1904, p. 225 s. A like indult is mentioned in the *Archiv f. k. Kirchenr.*, 1905, p. 336.

in accordance with the express declaration of 11 March 1891, positively and explicitly excludes from the power of dispensing the prohibitive impediments. In our opinion, it would be better to say that, in a case of urgent necessity, the prohibitive impediment *lapses in virtue of epikeia*, especially as it is only a question of a purely prohibitory law (1). It is for this reason, perhaps, that the faculties granted in 1888 concern only the diriment impediments, to the exclusion of the rest.

SECOND POINT. OBJECT OF THE DELEGATED POWER.

358. Limits of Bishop's delegated power:

Ordinaries have a delegated power varying with the extent of the faculties granted them by favour of the Holy See. We shall first mark out the limits of the *general* powers, then those of the special indults commonly granted to the *Ordinaries of Belgium* (in particular to the *Diocese of Bruges*), and to the *Ordinaries of England.*

A. **General power** of dispensing in favour of **dying concubinarii.**

1° He has an indult to dispense in favour of dying concubinarii,

On the 20 Feb. 1888, an Encyclical Letter of the C. S. O. permitted « *Ordinaries, either by themselves, or through an ecclesiastic appointed by them, to dispense in favour of the sick in danger of death (merely civilly married or otherwise living in concubinage), from even public impediments of the ecclesiastical law annulling the marriage, when there is not time for having recourse to the Holy See, except in the case of the priesthood and of licit affinity in the direct line* » (2).

Interpretation.

1. *The persons*, in respect of whom the Ordinary has power to dispense, are *concubinarii who are sick and dying.*

The decree, therefore, does not extend either to those who, without being sick, are in danger of death, or to the sick who have not contracted a so-called civil marriage, and are not living in concubinage, as the C. S. O. moreover expressly declared on

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1. Wouters also inclines to this opinion, o.c., p. 72, and in the *Ned. K.Stemmen*, 1911, p. 64 ; likewise Ferreres, *Los Esponsales*, nos 621 and 793 ; Boudinhon, *Ne temere*, no 93. Besson observes in this connection, *N.R. th.*, 1909, p.470, and Van Den Acker, o.c., p.70 s., is in agreement with him, that one who had taken a simple vow of chastity could be permitted to marry without a dispensation, in case of approaching death, and when it is consequently clear that no use could be made of the marriage.

2. *Collectan.*, no 47 s.

17 Sept. 1890 (*Collectan.*, n° 1475). It referred again to the same declaration on 3 May 1899 (1).

On the meaning of *concubinarii*, see *Collat. Brug.*, t. IV, p. 27 s., and also PUTZER, o. c., n° 60 ; *N.R. th.*, XX, p. 126, XXXI, p. 508 ; *Analecta eccl.*, 1899, p. 337 ; *Revue ecclés. de Metz*, 1900, p. 116 ; WERNZ, o. c., n° 617, note 69 ; most of these authors extend these faculties to include those also who have contracted an invalid marriage before the Church, at least if they acted in bad faith.

It must be carefully noted that, according to the declaration of the C. S. O. of 1 July 1891 (*Collectan.*, n° 1476), Ordinaries can, in virtue of the decree of 1888, dispense in favour of a dying person living in concubinage, even when the impediment directly affects the party in good health and not the sick person. « Thus, therefore, for instance, when a young woman and a deacon have been civilly married or are living in concubinage, if the young woman falls ill and the deacon is in good health », the Ordinary can grant them a dispensation. Cf. *N. R. th.*, XXIV, p. 49-51 (2).

2. *The impediments* to which this power extends are :

from diriment impediments of ecclesiastical law,

a/ *Diriment impediments of ecclesiastical law*, to the exclusion of impediments of natural law and of purely prohibitive impediments, particularly of the impediment of mixed religion (3), as the C. S. O. again expressly declared, 18 March 1891, deciding : « that disparity of worship, as a diriment impediment, was included in the encyclical of the C. S. O., of 20 Feb. 1888 ; while that of mixed

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1. The Vicar capitular of a diocese stated that in the said diocese there were some persons who « while living in a state of concubinage had had children and had subsequently ceased to live together, but that now being seriously ill, they wished to marry their respective accomplices in order to legitimate the children, or to repair the wrong done to the woman or to her reputation, or to put an end to the scandal, or to set their consciences right». This premised, he asked « if the said decree of C. S. O., of 20 Feb. 1888, extended also to the sick in danger of death, who are not living *at present* in concubinage, but who have lived in that state and have begotten children who require to be legitimated ». To this the S. Congr. replied that reference must be had to the decree of 1890.

2. In like manner a dispensation could be given, where required, for the party in good health, as being the only Catholic party.

3. Can the Bishop dispense from this impediment of mixed religion, in case of urgent necessity, not by virtue of his delegated power and in conformity with the decree of 1888, but in virtue of his *ordinary* power ? See our opinion just given above in n° 357.

religion, as a prohibitive impediment, was excluded from it ». *Collectan.*, nº 2188 ; cf. decree of the C. S. O., of 12 Apr. 1899, in the *R. th. fr.*, 1900, p. 262 s.

b/ *Even public*, that is to say, both occult and public, by nature and in fact, according to the clear declaration of the C. S. O., of 23 Apr. 1890, ad 1m, *(Collectan.*, nº 1473) ; cf. *N. R. th.*, XXII, p. 492 s. ; *Liber Manualis* of the diocese of Bruges, p. 162. *even public,*

c/ *Excepting only « the priesthood and licit affinity in the direct line »* ; as no distinction is made, affinity is understood in every degree. *excepting the priesthood and licit affinity in the direct line,*

Consequently, apart from these two impediments, Ordinaries can dispense from all diriment impediments of ecclesiastical law, including the impediment of crime arising from public murder of partner, the impediment of solemn vow and of Orders below the priesthood, and even the impediment of clandestinity ; this is stated by the C. S. O., 13 Dec. 1899, according to the text cited in the *Collat. Brug.*, t. V, p. 260. Cf. *Canoniste Contemp.*, 1900, p. 228 ; *Collat. Brug.*, t. X, p. 693 s. Moreover, in view of the absolutely general and wide nature of the terms employed,it is admitted that the Ordinary can use the power granted him,even if *several* of these impediments occur in the same case.

3. *Conditions.*

a/ Ordinaries can make use of these faculties granted by the Pope only *when time is wanting for recourse to the Holy See.* We have seen above, in nº 355, what interval is considered sufficient for applying to Rome. *under certain conditions ;*

b/ « The wish of His Holiness, in those extraordinary cases, in which unfortunately it may be necessary to grant a dispensation to such as have received the subdiaconate or made their solemn profession, and, after receiving a dispensation and being duly married, return to a better mind, is that Ordinaries inform the Holy Office of the dispensation granted, and, in the meantime, make every effort to remove the scandal as far as possible, should there be any, by inducing such persons to go away to some place where their ecclesiastical or religious status is unknown, or, if that cannot be done,that they at least impose upon them spiritual exercises and other salutary works of penance, and such a way of life as may tend to make reparation for their past excesses and serve as

an example of good Christian conduct to the rest of the faithful ». Decree of 1888.

c/ In dispensing from the other impediments, it is necessary to observe the conditions required by law concerning the imposition of penances etc. Particularly in dispensing from *disparity of worship*, the customary clauses and guarantees must be exacted, even in articulo mortis, as required by the instructions of the Holy See, given above in n^os^ 254 and 291, at the same time taking into account the restriction there made for the case in which the Catholic party alone is properly disposed, and in which there is moreover no danger of perversion.

he has also power to subdelegate parish priests.

Observation. In accordance with the terms of the decree of 1888, Ordinaries (Bishops and Vicars General) have power to grant a dispensation either by themselves or *through an ecclesiastic appointed by them ;* but according to the declaration of the C. S. O., of 9 Jan. 1889 (*Collectan.*, n° 1472), communicated by an encyclical letter of 1 March following, this faculty of subdelegating *habitually*, i. e., *in a general manner*, can be exercised in relation to *parish priests* alone (1), and only for the case when time is wanting for recourse to the Ordinaries themselves, and there is danger in delay. It would seem, however, that Ordinaries also possess the power of subdelegating any ecclesiastic whatsoever, having the requisite qualifications, *for a particular case*. Cf. *N. R. th.*, XXI, p. 370-378 and XXII, p. 492-494 (2). In 1892, the Bishop of Bruges granted this habitual subdelegation to his parish priests, as we shall poin out in article 3.

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1. According to the authoritative interpretation given by the C. S. O., 23 Apr. 1890 (*Collectan.*, n° 1473), « all those who actually have cure of souls, to the exclusion of curates and chaplains », are considered as parish priests. See also the reply of the S. Poenitentiaria, 17 June 1901, in the *Collat. Brug.*, t. VII, p. 106 s.

2. The *N. R. th.*, XXX, p. 634, and the *R. th. fr.*, 1898, p. 644 s., give a special indult of 25 May 1898, which grants for five years the power of subdelegating *in a general manner* not only parish priests, but also other suitable priests « in the remoter parts of the diocese, provided there is not time for recourse to the Ordinary or to the parish priest, and there is danger in delay ». On the recent decree of the S. C. de Sacramentis, of 14 May 1909, whereby simple priests are directly delegated by the Holy See, in certain circumstances, see below, n° 369.

B. **Special powers granted to the Ordinaries of Belgium.**

359. 2° *Quinquennial faculties granted by S. C. de P. F. to Ordinaries of Belgium.*

1. *Quinquennial* faculties *granted by Propaganda* (1) :

a/ « *Of dispensing in the 3rd and 4th degree, simple and mixed* (2), *in marriages to be contracted and contracted* (3), *and also in the 2nd degree, simple and mixed, in the case of converts from heresy, provided*

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1. Among the Indults of the S. C. de P. F. some, ten in number, are ordinary, and are designated *Formula* I, II, etc. ; others are extraordinary, of which some are marked *Formula* A, B, etc., others *Extra* A, B,.., and others *extr.* a, b... There is an excellent commentary on these indults in PUTZER, o. c. The powers granted to the Bishops of Belgium are marked *Formula* III or F. III ; they were renewed for five years for the Ordinary of Bruges on 26 June 1905. Cf. *Collat. Brug.*, t. X, p. 488 s. On the historical origin of quinquennial indults, see MERGENTHEIM, *Die Quinquennalfakultäten pro foro externo — Ihre Entstehung und Einfuhrung in deutschen Bistümern*, Stuttgart, 1908 (Cf. *Rev. d'Hist., eccl.*, 1909, p. 351 ss. ; *Archiv f. k. Kirchenr.*, 1910, p. 586 ss).

We should observe that these powers can no longer be granted by the S. C. de P. F., except, to those subject to its jurisdiction, under the new rules of the Curia. Cf. *Normae Peculiares*, c. VII, art. VI n° 3. They were, in fact, renewed in 1910, and prolonged *for two years*, for the Ordinary of Bruges by the Congregation of the Consistory. Nevertheless, in what follows, we keep to the practice of calling them quinquennial faculties of the S. C. de P. F.

2. This implies the power of dispensing *from consanguinity or affinity*, in the 3rd and 4th degrees, equal and unequal, also, in the same degree, from *public decency*, in so far as it is contained in legitimate affinity, however the degrees may be multiplied ; but this faculty does not include the power of dispensing from consanguinity *joined with affinity*. We have fully developed these two points in the *Collat. Brug.*, t. V, p. 480 ss. ; t. XIV, p. 617 ss. Cf. decr. C. S. O., 2 July 1884, in *Collectan²*., n. 1622, ad 2m.

3. By a *marriage contracted*, is here understood in general a marriage that is null, but that has, in the eyes of the Church, the *appearance of marriage*, as explained above, in n° 92 (together with the note). Under this denomination, therefore, comes neither concubinal union nor civil marriage between persons subject to the law of clandestinity. Nevertheless, such a civil marriage might, perhaps, be held as a contracted marriage, where it is certain that the parties intended a really conjugal contract, in accordance with what has been said in n° 233 ; for in our days, though the Church does not recognise any appearance of marriage in a union of that kind, it admits it to *sanatio in radice*, of which we shall speak below, n° 408. On this matter, cf. PUTZER, o, c., n° 16, and compare with the *Collat. Brug.*, t. V, p. 484 s.

In marriage *already contracted*, in virtue of the existing indult, a dispensation can be given, even if it was entered on by both parties in bad faith, as is clear from the decree of the C. S. O., 2 July 1884, ad 6m, l. c.

the first degree is altogether untouched, and, in these cases, of declaring the offspring legitimate » (1). N° 3.

b/ « *Of dispensing from the impediment of public decency, arising from lawful betrothment* ». N° 4.

c/ « *Of dispensing from the impediment of crime, when neither of the parties has contrived the death of the former partner* (2) ; *and of restoring the right to the debitum conjugale* ». N° 5.

d/ « *Of dispensing from the impediment of spiritual relationship, except between sponsor and godchild, and between the person baptizing and the baptized* » (3). N° 6.

360. 3° Quinquennial faculties granted by the S. Poenitentiaria.

2. *Quinquennial* faculties *granted by the S. Poenitentiaria* (4).

a/ « Of dispensing from the *occult* impediment of *illicit affinity* in the *first* degree, or in the *first mixed with the second*, or in the *second* alone, when it is a question of a marriage *already contracted* with this impediment, and provided that the sexual relations, if they have taken place with the mother of the reputed wife, were subsequent to the birth of this latter ; if this is not the case, the power is not granted. The penitent must be admonished of the necessity of private renewal of consent with the reputed spouse, after having informed the said spouse of the nullity of the former consent ; but this must be done with caution, so as not to make known the sin of the penitent. If it is not possible to inform the other party without grave danger, the consent is to be renewed in accordance with the rules

1. The power of legitimating the offspring is inserted *ex abundantia*, for, as we shall see presently, it is contained in the general power of dispensing, though adulterine children are excluded.

2. Thus it concerns solely the impediment of crime arising from adultery accompanied by a promise of marriage or from an attempted marriage.

3. The Bishop can therefore dispense from spiritual relationship arising from Baptism and Confirmation, with the exception of the impediment of paternity existing between the godfather and godmother and the child, and likewise between the child and the person baptizing or confirming. This latter exception was not formerly inserted in the decree, though it was generally admitted ; it is now inserted in accordance with the decree of the C. S. O., of 3 Dec. 1903, as we have remarked in the *Collat. Brug.*, t. X, p. 489 s. and t. VIII, p. 399 s. The Bishop, accordingly, has the power of dispensing from the impediment of *compaternity*, existing between the godfather and godmother and the parents of the child, and also, it would seem, notwithstanding the tenor of the reply of the S. Poenit., of 10 May 1876, between the person baptizing privately and the parents of the child. See hereon the *Collat. Brug.*, t. VIII, p. 401.

4. These powers were renewed for five years, for the Ordinary of Bruges, on 20 June 1905, as we have observed in the *Collat. Brug.*, t. X, p. 448 and 492 s. where we have also given the new terms of the Preface of the Pagella. In 1910, the same powers were again prolonged for five years.

laid down by approved authors. The occasion of sin must be removed and a heavy and salutary penance imposed, as well as sacramental confession once a month, during a period determined by him who grants the dispensation.

Also, by special and express authority of the Holy See, we grant you (the Ordinary) the power of dispensing from the above-mentioned *occult* impediment, i. e., of *affinity* arising from an *illicit* intercourse, even in the case of marriages *to be contracted*, and the faculty of *subdelegating* this power, even habitually, to *the parish priests* of your diocese, on condition that *all the preparations for the wedding have already been made*, and that the marriage cannot be postponed till a dispensation has been obtained from the Holy See, without danger of notable scandal ; care being taken to avoid the occasion of sin and to ascertain that the relations (if any) of the bridegroom with the mother of his fiancée did not precede the birth of the latter; a salutary penance being also imposed in every case ». n° XI.

b/ « Of dispensing from the *occult* impediment *of crime*, provided there has been no *machination* and it is a question of a marriage already *contracted*. The reputed husband and wife must be warned that the private renewal of their consent is necessary.

By the same special and express authority of the Holy See, we likewise grant you the power of dispensing from the same occult impediment,on condition that there has been no machination, for *marriages to be contracted, in urgent cases*, when there is not time for recourse to the Holy See ; in both cases a heavy and salutary penance is to be imposed together with sacramental confesssion once a month, for a period to be determined by him who gives the dispensation ». n° XII.

The Bishops of Belgium also receive ordinarily, under n^os^ IX and X, the power of *restoring, when lost, the right to the debitum conjugale*, that is to say, the power of dispensing with a view to the lawful use of marriage, in respect of those guilty of incest and those who have violated a private vow of chastity. See, on this subject, what has been said above in n^os^ 136 and 138, where mention is made of the twofold indult in question (1).

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1. The Ordinary of Bruges received an indult enabling him to dispense in the internal forum, in urgent cases, from the *public* impediment of *illicit affinity*, for the purpose of revalidating a marriage already *contracted*.The Holy See, restricting the faculty to ten cases, replied favourably to a request put in the following terms : « It sometimes happens that,after the celebration of a marriage contracted without a preliminary dispensation, it comes to light that the reputed husband and wife are under a *public* impediment of illicit affinity. And as, on account of the contract that they have made both before the civil magistrate and before the Church, they cannot, without grave difficulties, separate until a dispensation has

361. faculties granted to Ordinaries of England.

C. **Powers granted to the Ordinaries of England.**

Apart from the faculties of the Pagella of the S. Poenitentiaria, which are the same, the Holy See gives to the Ordinaries of England : 1. The powers *ad quinquennium*, and 2. certain extraordinary powers *ad biennium*.

1. The *quinquennial faculties* are identical with those we have just enumerated in n° 359 ; only the faculty inserted is more extended. This is the text : « Dispensandi in tertio et quarto consanguinitatis et affinitatis gradu simplici et mixto tantum, et in secundo, tertio et quarto mixtis, tam in contractis quam contrahendis ; et etiam quoad contracta in secundo solo, dummodo non attingat primum, cum iis qui ab haeresi vel schismate vel infidelitate convertuntur ad fidem catholicam, datis, si una pars tantum convertatur, cautionibus ab Ecclesia praescriptis ; et in praefatis casibus prolem susceptam declarandi legitimam ».

In addition to this, these quinquennial faculties include the power « dispensandi et commutandi vota simplicia etiam castitatis in alia opera pia, ex rationabili causa, non tamen religionis » (1).

2. The faculties *ad biennium* are the following :

a/ That of dispensing within the limits of his own diocese, when there are just and grave reasons for doing so, from the impediment of mixed religion, provided the conditions prescribed by the Church are completely safeguarded, and in particular, those concerning the removal of danger of perversion from the Catholic party, the duty that the Catholic party is under of striving earnestly to bring about the conversion of the non-catholic party, and the complete education of the whole of the offspring of either sex in the holy Catholic religion ; and on the strict understanding that, neither before nor after the marriage celebrated in the presence of the Catholic parish priest, shall the parties appear before a non-catholic minister ; express mention of the Apostolic delegation being made in each and every dispensation of this kind, and in other respects the annexed printed instructions being observed.

b/ That of dispensing Catholics subject to their spiritual jurisdiction, for

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been obtained from the Holy See, the Bishop petitions that Your Holiness will deign to grant him, in the like case, power to dispense in virtue of the apostolic authority, while fully observing the conditions imposed in the case of an occult impediment ». Cf. *Collat. Brug.*, VI, p. 600 s., where we give a brief explanation of the indult and show that its use is restricted to the case in which the nullity of the marriage is not publicly known.

1. The Bishops of England also receive the power « dispensandi cum gentilibus et infidelibus plures uxores habentibus, ut post conversionem et baptismum, quam ex illis maluerint, si etiam ipsa fidelis fiat, retinere possint, nisi prima voluerit converti ».

the purpose of contracting marriage, from the impediment of the second simple, or even when mixed with the first, degree of consanguinity or affinity, provided there is urgent necessity and the matter does not admit of delay, it being left to the Bishop's conscience, it being also understood that on the expiry of the present faculties and before their renewal, he shall furnish a return of the number of dispensations granted.

c/ That of dispensing from the aforesaid degrees Catholics subject to them in the case of mixed marriages already contracted, so that the Catholic party, after having been absolved from the guilt of incest and from the censures incurred, may validly and lawfully contract marriage afresh with the non-catholic party, for the legitimation of the children already born and to be born hereafter, provided that the conditions prescribed by the Church be in every way safeguarded, as above (under a) ; the obligation being imposed on the Bishop of making a return of the number of such dispensations, after the expiry of the present faculties.

d/ That of dispensing, under the same obligation of furnishing a return of the number of dispensations after the expiry of the present faculties, Catholics subject to him, in mixed marriages already contracted, from the degrees of consanguinity or affinity, from which he is able to dispense in marriages between Catholics in virtue of Formula II, provided that the conditions prescribed by the Church be safeguarded in every way according to the preceding article (under c).

Observation.

362. Power of dispensing implies power of legitimating the children.

1. The power of dispensing from the impediments of marriage, whether ordinary or by indult, supposes the power of *legitimating the children*, according to the legal rule on which the S. Poenitentiaria insists in its reply of the 1 July 1859 (1), and which the C. S. O.

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1. « With regard to the indults by which the Holy See grants Ordinaries, through the agency of the S. Poenitentiaria, the power of dispensing from certain impediments, the mind of the S. Poenitentiaria, in granting these *faculties*, has been and still is that the power of dispensing from the impediments should carry with it the power of legitimating the children, except such as are adulterine ».

It is different when it is a question of granting or executing a dispensation *in virtue of a rescript for a particular case*, as stated in the same reply : « As to *rescripts of dispensation*, granted in particular cases..., the power of legitimating the children is contained therein only so far as expressly indicated in the document ; otherwise new powers are necessary to enable the executor to legitimate them ». Cf. *Collat. Brug.*, t. XIV, p. 97 s. We there give the reply of the S. Poenitentiaria, of 21 Apr. 1908, confirming this doctrine. See also page 172, where

expressly applies, 8 July 1903 (1), to the indult of 20 Feb. 1888. *Exception must be made*, in the case of adulterine children and those born of or to « persons bound by sacred Orders or by solemn religious profession » (2).

« In like manner, the general faculty of dispensing involves (as far as necessary) the power of *absolving from censures*, so that the dispensation may take effect » (3).

The delegated power belongs to the Ordinary.

2. The *delegated* powers which we have juist enumerated, on whatever title they are granted, are granted habitually, and accordingly belong to the *Ordinary* and, consequently, to the Vicar General and the Official, to the Vicar Capitular, when the see is vacant, or to the legitimate administrator of the diocese, and that by the provisions of the law itself (4). It is not so with the *ordinary* power defined above, which belongs properly to the Bishop, and the Vicar General does not possess it, unless specially delegated by the Bishop. The Bishop, however, generally delegates the Vicar General or the Official, and it is through the agency of the Official that he regularly exercises his ordinary power of dispensing. Cf. n° 368, towards the end.

Principles of

3. *To the general power* of dispensing the principles of *wide* inter-

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we state that the S. C. de Sacram. insists on the same principle, 27 Jan. 1909, and desires that petitioners should ask for legitimation.

1. *Collat. Brug.*, t. VIII, p. 639 s.

2. The same decree of 8 July 1903.

3. Gasparri, o. c., n° 429.

4. According to the successive decrees of the C. S. O., of 24 Nov. 1897, 20 Apr. 1898, 22 June 1898, 3 May 1899, 5 Sept. 1900 and 22 Aug. 1906, the powers granted *habitually* to Bishops are considered as granted to *Ordinaries*. This provision applies to indults anterior to 1897 as well as to those granted to Bishops at a later date, and there is no need to concern oneself with the limits laid down in the text of the episcopal faculties relative to the power of delegating the Vicar General (decr. of 1906). The *habitual* powers are those « of which Bishops make use as often as they wish, though only to a fixed date », and also those « of which they can make use for a fixed number of cases only ». See the decrees cited in the *Collat. Brug.*, t. X, p. 488 s. ; and the *American Ecclesiastical Review*, 1906, p. 627 ss.

In accordance with the decree of the C. S. O., of 22 Aug. 1906, the text of which is quoted in the *Collat. Brug.*, t. XII, p. 140, we must, however, observe that, if the Vicar General can *validly* use the indults without the permission of the Bishop, nevertheless, for the *licit* use of them he must conform himself to the judgment of the Bishop, « servato... debito subordinationis officio ».

pretation are to be applied (1), but without going so far as expansive interpretation, and the intentions and practice of the Holy See must be borne in mind. Cf. De Becker, *De Matr.*, p. 317 s., and Pompen, o. c., n° 169. *interpretation.*

Thus, the power of dispensing from affinity extends to licit and illicit affinity ; the power of dispensing from consanguinity or affinity in a certain degree extends to those impediments in the said degree, even if they are multiplex (2) ; the power of dispensing from an impediment applies to marriages contracted or to be contracted ; on the contrary, the power of dispensing *with a view to the contracting* of marriage cannot be applied to a marriage already *contracted*, and vice versa.

PARAGRAPH II. THE SUBJECT CAPABLE OF EPISCOPAL DISPENSATION.

363. The Ordinary or Bishop dispenses directly in favour of those of his own diocese only,

I. The Bishop or Ordinary can, in virtue of his power, whether ordinary or delegated, dispense *directly only in favour of those of his own diocese* (3) ; but *indirectly* he can dispense others also, for by granting a dispensation to one of his own diocese, he also sets the other party free from the correlative impediments (4).

For the *validity* of a dispensation, granted in virtue of *ordinary* or *delegated* power, it is necessary and sufficient that *one of the parties* should be *under the jurisdiction* (5) of the dispensing Bishop :

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1. We say « to the *general* power », because these principles are not applicable to rescripts of dispensation for particular cases.

2. Reply of the S. Poenitent., 20 Apr. 1883 (*Collectan.*, n° 1244) ; cf. *Folium* ad decr. C. S. O., 26 Apr. 1875 (*N. R. th.*, XV, p. 36 s.).

3. See the declaration of the S. Poenit., 4 Sept. 1839, and the decree of the C. S. O., 22 Nov. 1865 ; in the *Collat. Brug.*, t. V. p. 476 s. and t. XIII, p. 36 ss.

4. See above, n° 235.

5. Before the Decree *Ne Temere*, in this respect as in others, all those having domicile or quasi-domicile in a parish of his diocese, as well as those of no fixed abode (vagi), were subjects of the Bishop. But since the Decree *Ne Temere*, the proper Bishop, for the licit celebration of marriage, is not the Bishop, of the quasi-domicile, but he in whose diocese the contracting parties make a month's stay. Is this provision applicable also in the matter of dispensation ? Is the Bishop, competent to grant the dispensation, no longer the Bishop of the domicile or quasi-domicile, but he in whose diocese the subject of the dispensation has his domicile or month's residence ? Though uniformity in the new discipline is desirable, it appears from the papers as yet issued that the month's residence

namely, the Catholic party, where the impediment of disparity of worship or of mixed religion is concerned ; or the party directly bound, if the impediment is an absolute one ; or one of the two, when it is a question of relative impediments (4). It is necessary that the person concerned should be still under the authority of the Bishop *at the time of the granting of the dispensation*. This is not the time at which the document, granting the dispensation in gracious form (the only form employed by the Bishop of Bruges), is received by or communicated to the petitioners, but that at which the decree of publication is signed at the office of the Official.

even when they are out of the diocese,

II. Supposing the party directly dispensed to be a subject of the dispensing Bishop, *the presence of the dispensing or dispensed party within the diocese* is quite unnecessary, when *ordinary* power is concerned ; in this case it makes no difference if the Bishop or his subject, or both of them are abroad.

unless the indult disposes otherwise,

This holds good also for *delegated* power, unless a clause requiring the presence « is inserted (in the indult), or the will of the Sovereign Pontiff is otherwise known, or the matter itself requires it » (1).

as in the quinquennial faculties of the S. C. de P.F.

In the *quinquennial* faculties of Propaganda, but not in the *Pagella* of the S. Poenitentiaria (2), occurs this clause, that the powers can be exercised « *only in the diocese of each Bishop* ». In

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concerns only the celebration of marriage, and that it cannot be applied to other points until a fresh declaration has been made. Cf. above, nº 36, and also nº 73, where we have stated that, for determining who is the proper Ordinary, only the domicile or quasi-domicile in a determinate *parish* of the diocese is to be taken into account.

1. Where the intending parties belong to *different* dioceses, both the Bishops can *validly* dispense from these relative impediments, as is clear from the documents cited in the *Collat. Brug.*, t. V. p. 477 ; it is right, however, (except when the impediment arises from the delinquency of one of the parties, in which case recourse must be had to the Bishop of the guilty party) that the Bishop of the bride should dispense ; and it is the custom, though not universally so, that the dispensing Ordinary should first obtain his colleague's approval. Moreover, « if it is a question of a particular prohibition of celebrating marriage *during the forbidden time*, it is always necessary to obtain the permission of the Bishop in whose diocese the marriage is to take place, because this prohibition concerns the exterior order of the place where the ceremony is performed». Theol. Mechl., o. c., nº 10 s.

2. C. S. O., 22 Nov. 1865, in the Collectan., nº 1432.

3. A similar clause was inserted in the Pagella granted to the Bishop of Bru-

accordance with this formula, the Ordinary can dispense those of his own diocese, even if he happens to be outside of his diocese ; but it is necessary for the validity of the dispensation that *the party directly dispensed should be within the diocese at the time when the dispensation is granted*, i. e., when the decree of fulmination is signed (1). Cf. *Collat. Brug.*, t. V, p. 478 s., t. X, p. 491 s. and in particular p. 690 ss., where we have called the special attention of parish priests to this point.

Observation. 1. The clause mentioned in n^os^ I and II concerns only the act of the Bishop when he himself *dispenses*, by his ordinary or delegated power ; it does not apply to the case in which the Ordinary simply receives a commission *to execute a dispensation* granted by the Holy See ; for, according to the decree of 20 Feb. 1888, he can execute an Apostolic rescript of this kind « even if the contracting parties, at the time when the dispensation is to be executed, have left their domicile in his diocese and permanently removed to some other ». Cf. what we say in chapter V, n° 388.

2. *Kings and royal princes* are not included in the scope of episcopal faculties, and the Holy See reserves to itself the power of dispensing in their regard (2).

3. The Bishop, unless he has special faculties, can dispense only for a marriage between *determinate* persons ; hence, with an ordinary indult to dispense from disparity of worship, he cannot permit a Christian to take an unbaptized wife to be chosen on some future occasion. Cf. SICA, o. c., p. 340 s.

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ges before 1905,but it disappeared from the renewal of the indult in 1905 and 1910, and the new faculties even expressly permit the Ordinary to make use of the indult « outside of the diocese, when he or his subject, or both of them at the same time are away from it ». *Collat. Brug.*, t. X, p. 493 s., where we observe that, in virtue of this indult, the exercise of the power, in the case of those *subdelegated*, is restricted to the territorial limits of the diocese.

1. Decr. of the C. S. O., 2 May 1877, in the *Collectan.*, n° 158.

2. The S. C. de Sacram., 7 March 1910, « carrying out the commands of Our Holy Father Pope Pius X, by his express command and authority, declared that all dispensations from impediments diriment or prohibitive, to be granted *to kings and royal princes*, were specially reserved to the Holy See, to the exclusion of all Ordinaries and dignitaries, whosoever they may be ; and that this faculty is not in any way included in the powers granted to any person soever and under any form whatsoever », *Acta Ap. Sed.*, II, p. 147 ; cf. *Collat. Brug.*, t. XV, p. 307 s.

PARAGRAPH III. NATURE OF THE BISHOP'S POWER, AND THE PRINCIPLES THAT REGULATE ITS EXERCISE.

364. The Bishop's ordinary power is in general for the internal forum.

I. NATURE OF HIS POWER.

A. The Bishop's **ordinary** power (except that of dispensing from the banns and the unreserved vows, and also that of dispensing from *doubtful* public impediments, which many authors assign him) is a power of dispensing *in the internal forum* ; consequently, a dispensation granted in virtue of this power is good only for the forum of conscience, and it must be asked for and executed according to the form proper to that forum.

As to his delegated power : the powers granted by the S. Poenitentiaria are of the internal forum ;

B. As to his **delegated** power :

1. The powers granted by the *S. Poenitentaria* are of *the internal forum*, and consequently their exercise is limited to occult cases, as stated in the text itself ; the dispensations granted in virtue of these powers do not hold good for the external forum, and they must be asked for under fictitious names.

The Ordinary can use them sacramentally, in confession, or extra-sacramentally, as stated in the preface of the Pagella, while those subdelegated can, in this case, dispense « only in confession ».

the quinquennial powers granted by the S. C. de P. F. are of the external forum ;

2. The powers granted by the S. C. de P. F. are *of the external forum*, and dispensations granted in virtue of these powers are valid for that forum (and also indirectly for the internal forum) ; they must be asked for and executed in accordance with the forms proper to the external forum, even when the impediments are occult in fact.

We have proved this assertion at length in the *Collat. Brug.*, t. VIII, p. 133 s. 195 ss. and p. 512, observing that there is no ground for excepting public decency arising from occult betrothment.

the powers of 1888 are of either forum.

3. The powers of 20 Feb. 1888, *in favour of dying concubinarii*, are *for either forum* ; the Ordinary can make use of them for the external or the internal forum, according to circumstances, i. e., according as it is a question of a public or of an occult impediment.

II. PRINCIPLES THAT REGULATE ITS EXERCISE.

365. The Bishop cannot dispense from

A. « If to an impediment from which the Bishop has power to dispense there is joined another for which a dispensation from

the Holy See is necessary, the Bishop is thereby deprived of his power of dispensing from the former, and in this case a removal of all the impediments must be obtained from the Apostolic See » (1). We must except, however, dispensation from banns and from the unreserved vows, from which the Bishop can dispense by his ordinary power, even when the case is not urgent. From these he can dispense separately, even though they are joined with an impediment in respect of which he has no faculties. The principle is, therefore, limited to impediments from which the Bishop can dispense by his delegated power, or by his ordinary power in urgent cases (2).

one impediment, if he cannot dispense from all.

B. The Bishop is also deprived of his power, through the seizure of the Pope, when application has been made to the Holy See in the matter of an impediment from which the Bishop has power to dispense in virtue of an indult. Nevertheless, should an urgent necessity arise during the application to Rome, the Bishop can then make use both of the ordinary and delegated power that he has for urgent cases (3).

C. The Ordinary, who dispenses in virtue of an Apostolic indult, is bound, in the exercise of his power, to observe not only the clauses of the indult, but also *the style of the Curia*, which is prescribed when the Holy See itself dispenses and when an Apostolic rescript is executed. It is necessary, therefore, to comply with the required prescriptions in the drawing up of the supplica, the execution of the dispensation and the drawing up of the formula of fulmination, in accordance with the rules given below, in nos 381 ss. and 390 ss. These prescriptions are not all necessary

He is bound, when using his delegated power, to employ the style of the Curia.

1. Theol. Mechl., o. c., p. 409; cf. *Collat. Brug.*, V, p. 609.

2. Should an impediment *of the external forum*, in respect of which the Bishop has power of dispensing, occur in conjunction with an impediment *of the internal forum*, in respect of which he has not the power of dispensing, having regard to what we shall have to say, in no 384, as to twofold recourse, the Bishop could dispense from the impediment of the external forum, and have recourse to the Holy See for the impediment of the internal forum, mentioning in the supplica the dispensation that he has granted from the public impediment, naming it, and praying that this dispensation may be made valid in the internal forum.

3. *N. R. th.*, XVIII, p. 222 s. The case may occur when the dispensation from Rome arrives later than expected. See also *Collat. Brug.*, t. XIII, p. 404; Feye, o. c., nos 726, 639, under 2°, in note, and 631, under e, 8°; Pompen, o. c., no 159, note 2.

for validity ; several, in particular those which concern the outward form of the supplica and the formula of fulmination, are required only for licitness, and « so far as circumstances of matter, time and place permit » (1).

On the other hand, where the Bishop dispenses by his ordinary power, it is certainly right that he should conform, as far as possible, to the style of the Curia, but this is not required for the strict licitness and, a fortiori, for the validity of the dispensation. Thus, in the act of fulmination, it is sufficient that the essential elements should be expressed, that is to say, given a proportionate cause, that the dispensation be duly expressed and the impediment sufficiently determined.

Observe, finally, that the Bishop can exercise his power, whether ordinary or delegated, either *in gracious form* or *in commissarial form* (2).

366. He can use his ordinary power only in default of delegated power.

D. When the Bishop receives a *delegated power,* the ordinary power that he has in virtue of the presumed or tacit consent of the Sovereign Pontiff seems to cease *for the forum and for the cases named in the delegation,* so that he must then observe the conditions and clauses set forth in the indult and employ the style of the Curia (3). One can no longer speak of the presumed or tacit will of the Holy See, where this will is clearly expressed.

Thus, when there is imminent danger of death, the Bishop, for the purpose of dispensing in favour of a concubinarius, cannot have recourse to his ordinary power, but must make use of the

1. Cf. the S. C. de P. F., 22 Nov. 1860 *(Collectan.,* nº 1487), and especially the decree of the C. S. O., of 15 June 1875 *(ibid.,* nº 1491).

To the question : « Is a dispensation from matrimonial impediments granted by an Ordinary, in virtue of habitual Apostolic faculties, valid, though gravely illicit, when it is not in form, because there is not expressed therein the text or duration of the delegated power or because it has been granted in a few words by telegraph or only orally ? », it was answered : « Affirmatively, provided the woman has not been abducted, or, if abducted, that she is no longer in the power of the abductor (this clause as to abduction is customarily inserted in the quinquennial indults received by the Bishops) ; but the clauses must be exactly observed, at least so far as the circumstances of matter time and place permit ». See especially nos 393, ad 1m, and 397.

2. In the diocese of Bruges, the Bishop always dispenses in *gracious form,* as will be stated later.

3. Feye, o. c., nº 613.

indult of 1888, and conform to the clauses inserted therein and to the style of the Roman Curia. It is the same, in case of necessity, with dispensations from occult illicit affinity and from occult crime. Nevertheless, he may sometimes lay aside his delegated faculties and recur to his ordinary power, when there is a grave reason against using the indult. This may happen, e. g., in the case of an impediment of public decency arising from occult betrothment, from which the Bishop can dispense both in virtue of the quinquennial faculties of Propaganda, and also, in case of urgency, by his ordinary power. Regularly, he must make use of the quinquennial indult ; but as this only permits dispensation in the external forum, he may, where there is grave reason for suppressing the names of the persons concerned, in a case of urgency, act in virtue of his ordinary power and, consequently, grant the dispensation under fictitious names (1).

Observation. When the Bishop, in default of delegated power, *in an urgent case* has recourse to his ordinary power for dispensing from an impediment, he must make use of the same power for all the impediments to be removed by the *act in question*, even though he has delegated powers for the other impediments taken separately (2).

367. *The general principle is that the Bishop cannot, without a particular indult, dispense cumulatively, in virtue of his delegated power,*

E. With regard to the power of **cumulating**, i. e., of dispensing at the same time from several simultaneous impediments, the rules to be observed are :

1. When the Bishop dispenses in virtue of *delegated* power :

The general principle is that « those who have various powers of dispensing cannot make use of them *simultaneously* in one and the same case ; that is to say, they cannot dispense the same person from various impediments, unless they have obtained expressly from the Holy See the power of cumulating ».Cf. the *Folium* annexed to the reply of 25 Apr. 1873, in the *N. R. th.*, XV, p. 36-37 (3).

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1. Cf. *Collat. Brug.*, t. V, p. 544 ss. ; t. VIII, p. 133 and 511 ss. ; t. X, p. 130 s., where examples are given that assist the understanding of the question.

2. Thus, if, in an urgent case, the impediment of occult affinity occurs in conjunction with that of crime with machination, the Bishop must dispense from both impediments by his *ordinary* power. It is the same, if, in an urgent case, he has to revalidate a dispensation of the Holy See that is invalid owing to an occult defect, and at the same time to dispense from occult affinity.

3. This principle, formerly denied or called in question by many authors, is

This principle applies not only to diriment impediments, but also to prohibitive or to diriment impediments occurring simultaneously with a prohibitive impediment (1).

But there are many *derogations* from this principle, based either on a provision of the law, or on an express permission of the Holy See. For, a) according to the decree of 31 March 1872, to which the C. S. O. refers, 18 Aug. 1897, the general prohibition of cumulating does not extend « to cases in which an impediment, *public* by its nature, occurs simultaneously with another impediment, *occult* or of the internal forum» (2) ; b) the *S. Poenitentiaria* expressly permits Ordinaries to use the powers enumerated above for dispensing from crime and illicit affinity, « not only separately, but simultaneously in one and the same case ».

The general principle forbids the Bishop, unless by special indult, to dispense simultaneously from several impediments that he can remove separately in virtue of the quinquennial faculties of the S. C. de P. F. But many Bishops have the *indult* or permission, so that « they can use the powers granted by the Holy See for matrimonial dispensations.... even *cumulatively*, when it happens that the degrees or impediments are multiplied » (3).

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enforced repeatedly by various Roman decrees, replies and instructions, especially by those of 16 June 1868, 10 Feb. 1869, 8 Sept. 1869, 14 Feb. 1881, etc. These and other documents may be found in Feye, *De Imp.*, n° 631, under e) ; and especially in the *N. R. th.*, XIV, p. 619-623, XV, p. 34-48 ; *R. th. fr.*, 1898, p. 12 ss. Cf. also the decree of 1897, which we shall cite presently ; Gasparri, o. c., I, n° 428 ; De Becker, *De Matr.*, p. 297 with the note.

As stated in the *Folium* of 1873, already quoted, « several impediments taken together render a prospective marriage more unbecoming and more illegal than if they stood alone » ; this is why the Pope dispenses from them with greater difficulty, and « if the Pope dispenses with greater difficulty, he will also grant to others the power of dispensing with greater difficulty ».

1. The principle does not apply to multiplication *of degrees*, as we have observed above, n° 362.

2. *Collat. Brug.*, t. V, p. 608. We have seen above that the faculty of dispensing the dying is cumulative.

3. The Ordinary of Bruges receives this indult habitually, to be renewed each year. The entire text and its successive modifications, together with an interpretation, may be found in the *Collat. Brug.*, t. VIII, p. 509 ss., and t. IX, p. 393, where we have observed that, having regard to the text of the quinquennial faculties and the general principle, mention of multiplication of degrees is inserted *ad abundantiam*.

Note that the indult for cumulating does not extend to the indult *sanandi in*

2. The Bishop, who dispenses in virtue of his *ordinary* power, can dispense simultaneously from several impediments, as well as separately. *but in virtue of his ordinary power.*

3. In like manner, when there occur together an impedimeut for which the Bishop has a *delegated* power,and another from which he can dispense, *apart from a case of urgency,* by his *ordinary* power, e. g., the omission of banns or an unreserved vow (cf. n° 357),he can dispense cumulatively also, as is clear from the decree of 18 Aug. 1897, ad 2m, already cited (1).

Observation. It does not seem, as some Authors hold, that there is need of a *most special* indult for using simultaneously the power of dispensing from *mixed religion* and of removing other concurrent impediments ; the special indult,of which we have spoken,suffices ; this is evident from the decree of 18 Aug. 1897, already mentioned (2).

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F. As to the **communication** *or* **delegation** (3) of the power of dispensing, these are the rules: *He can communicate his ordinary power,*

1. The Bishop can, at will, *communicate and delegate* his *ordinary* power, generally or specially, habitually or for a limited period.

2. The powers *delegated* by the Holy See may also, in principle, be *subdelegated* by the Bishop, according to the legal maxim : « Delegatus a Principe subdelegare potest ». Sometimes, however, it happens that the text of the indult itself takes away or re- *and even his delegated power, unless there is a restricting clause in the indult.*

radice, if one has obtained it, as stated in the decree of the S. C.de P. F. 30 Jan. 1882 ; cf. Feye, *De Imp.*, n° 631, ad e.

1. « When two impediments occur simultaneously, the one diriment and the other prohibitive,... is a special faculty of cumulating required ? » :« Affirmatively, for prohibitive impediments, the dispensation from which is reserved to the Holy See ; for the rest the Bishop can use his own right ». *N. R. th.* p. 197 ss.

2. Above, in n° 195, we have already stated that simple delegated power of dispensing from disparity of worship is without force in relation to the case of a converted infidel who wishes to use the privilege of the faith.

3. Communication and subdelegation are not synonymous. « *Communication* gives complete participation in the Apostolic faculty ; by it, for the time fixed, one is made the delegate of the Pope, even if he who communicates the faculty dies or resigns his office. *Subdelegation* gives a less full share in the Apostolic faculty ; by it one becomes the subdelegate merely of the delegate of the Pope, for the time fixed, and ceases to be such, when he who delegates dies or resigns his office ». Schaepman, *Eccl. Rev.*, XVIII, 22, according to Putzer, o. c., nos 29-31. For our part, we employ the two terms indiscriminately, whenever it is a question of habitual subdelegation. Cf. below, n° 370, at the end.

stricts this power. In this case the limits laid down must be strictly observed (1).

The following are the *restrictions* ordinarily made :

a/ The wide faculties of 1888, granted for dispensing *in the case of dying concubinarii*, can be *habitually* subdelegated only to parish priests, as we have seen, and only for cases « in which there is not time for recourse to the Ordinary himself, and it would be dangerous to wait » (2). See above, n° 358.

b/ As to the quinquennial faculties granted by the *S. Poenitentiaria*, the Ordinary can communicate them « to the Canon Penitentiary and the Deans for the forum of conscience and in confession alone, but habitually, if he so wishes ; to other confessors, when they apply to him in a particular case affecting their penitents, he can communicate them for the case set forth, unless he thinks it advisable for particular reasons to delegate specially certain confessors for a time to be determined by him ». In particular, the power of dispensing from *illicit affinity*, in marriages contracted or to be contracted, can be subdelegated habitually only to *parish priests*, to be used when all is prepared for the marriage and there is urgent necessity. See the text quoted above, in n° 360.

Apart from these restrictions and such as may be hereafter imposed, the faculties of Bishops can be freely subdelegated, e. g., the quinquennial faculties of Propaganda, and that can be done even habitually, though without power of subdelegation. Besides, the text itself, in n° 20, clearly says that they can be communicated « wholly or in part... to suitable priests labouring for the conversion of souls ». Cf. *Collat. Brug.*, t. X, p. 490 s.

Note. A Bishop cannot dispense *in commissarial form*, except in

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1. The C. S. O., 17 Dec. 1898, to the question : « Can a Bishop, without special permission, subdelegate to his Vicars General, or to other ecclesiastics, generally or at least in a particular case, the temporary powers delegated to him by the Holy See ? », replied : « Affirmatively, provided this is not forbidden in the indult, and the faculty of subdelegating is not there restricted to certain persons only ; for, in that case, the tenor of the rescript must be strictly observed ». Therefore, the legal maxim « *The delegate of the Supreme Head can subdelegate* » is regularly applicable. Cf. *Collat. Brug.*, t. VI, p. 127 ; t. IX, p. 675 s. ; *R. th. fr.*, 1899, p. 458 ss., 1904, p. 721 ss. ; cf. also above, n° 65.

2. Those who are not parish priests cannot, without a special indult, be subdelegated, except for a particular case. See, however, below, n° 369.

so far as he has the faculty of delegating or subdelegating. Cf. the *Folium* in the *Causa Baltimoren.*, 30 June 1910, *A. A. S.*, II, p. 591 s.

G. **Cessation** of the power of the Bishop or Ordinary :

How the Bishop's power comes to an end.

The powers received in virtue *of a delegation of the Holy See* do not come to an end *by the death of the Sovereign Pontiff ;* in the first place, because they are considered as *gratiae factae* (1) of the quinquennial powers of Propaganda, and secondly, in accordance with what has been stated above, at the end of n° 351, because, at the death of the Pope, the *ordinary* powers of the Sacred Congregations still continue (2).

Nor do they come to an end *by the death of the Bishop* (3), since they are granted to the Ordinary, and so, on the see becoming vacant, appertain to the Chapter and Vicar Capitular (4).

The *ordinary* power of the Bishop obviously ceases for him at his death, but it passes to the Chapter and Vicar Capitular.

H. On the use of **doubtful** power.

Use of doubtful power.

If the doubt concerns, not the fact of having received the power, but its validity or extent, there is no reason why the Bishop should not proceed to dispense, at least if there is some reasonable cause for doing so ; for the Church is considered to supply the want of power, should there be any, on account of the existence of the *titulus coloratus* together with the *error communis*. Should it be subsequently ascertained that the limits of his power have been exceeded by the Bishop, there would be no need of seeking a fresh dispensation, since the Church is supposed to have supplied ; but it would be right, for greater security, to lay the matter before the Holy See.

Observation. 1. As we have remarked above, in n° 362, the

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1. Cf. on this, n° 65 and the *Collat. Brug.*, t. VII, p. 264 ss., where we have explained the principles relating to this question.

2. If the Ordinary had received some power by special mandate of the Holy Father, this second reason would not apply to it.

3. Delegated powers cease *with the passing of the period* for which they were granted, unless a special clause provides for the want of renewal. This is the case with the Quinquennial Indults of the S. Poenit., which provide that « if through forgetfulness or inadvertence (the Bishop) uses these powers beyond the allotted time... the dispensations thus granted shall be ratified and valid ».

4. At the death of the Bishop, the powers of the *Vicar General* cease.

Vicar General has no need that the *delegated* faculties of the Holy See should be subdelegated to him, since he receives them directly from Rome in his capacity of Ordinary ; in like manner, he is unaffected by the various restrictions, inserted in the indults granted to the Bishop, with regard to the power of subdelegating. On the other hand, the *ordinary* powers of the Bishop must be communicated to him by special mandate.

2. The observations concerning *communication or subdelegation* of an *indult* are not applicable to the office, sometimes entrusted by the Holy See to the Ordinary, of executing a *rescript* of dispensation ; this is, moreover, in accord with the plain statement of the C. S. O., of 19 June 1904 (1). Nor do they apply to the power of which we have spoken above, in n° 346, 4, in virtue of which the Ordinary finds himself delegated by the Holy See, in an altogether particular case, to dispense pro arbitrio.

In like manner, what we have said of the *cessation of an indult* granted to the Ordinary, must not be extended to the execution of a *rescript* of the Holy See, or to the power of dispensing in an altogether particular case. See below, ch. VI, n° 402.

Article 3. The Priest.

369. Priests have no ordinary power of dispensing,

Priests, whether they are or are not parish priests, have no *ordinary* power of dispensing, in either forum, either of themselves, or by custom, or by the presumed or tacit consent of the Church. In certain cases, however, they can be *delegated* or subdelegated to dispense, even habitually, and this is the practice in varying degrees in different dioceses.

but they can receive delegation ; and this is in fact granted to simple priests,

I. **Simple priests** « who, in accordance with art. VII of the decree *Ne Temere*, can validly and licitly assist at a marriage with two witnesses, when there is danger of death, and when they cannot apply to the parish priest or the Ordinary, or to a priest delegated by one or the other of them, can, under these circumstances, *dispense from all impediments, even public, invalidating marriage*

1. *Collat. Brug.*, t. IX, p. 675 s. ; cf. t. VI, p. 125, t. V, p. 670 and 677 ; *Theol. Prakt. Quartalschrift*, 1905, p. 371 s. This office may be imposed on all those who come under the designation of Ordinary, whether of the place or of the petitioners ; but it cannot, without special permission, be entrusted to others, except to some other Ordinary. Cf. n° 388.

in the ecclesiastical law, apart from those of the priesthood and licit affinity in the direct line » (1). In other words, for the purpose of dispensing and legitimating, they then have the same powers as Bishops in respect of dying concubinarii ; and they require nothing more than the fulfilment of the conditions that make their assistance at the marriage lawful,as we have stated above in n° 68.

These faculties, granted by Pius X, are more extended than those granted by Leo XIII in 1888. For they apply even to those who are *not sick* (2), but who are in imminent danger of death, even though they are *not concubinarii*, provided that they wish to marry in order to set their consciences right or to legitimate their children (3) ; moreover, they seem to include also the power of dispensing from the impediment of *clandestinity*, that is to say, from *the presence of the witnesses*, as we have said in n° 358. See the *Collat. Brug.*, t. V, p. 260 s., p. 420 s. and t. XVI, p. 197 (4). They are also considered to benefit, no less than the faculties of 1888, by the interpretation given by the C. S. O. 1 July 1891 (see n° 358), in virtue of which, it is indifferent whether the impediment to be removed directly affects the partner in danger of death or the other one.

Furthermore, the S. C. de Sacr., 29 July 1910, declared that *parish priests* were not excluded from the benefit of these powers, though the text of the grant seemed to say otherwise (5). Conse-

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1. Decree of the S. C. de Sacr., of 14 May 1909 ; in the *Acta Apost. Sedis*, I, p. 468 s. (*Coll. Brug.*, t. XIV, p. 442 s.).

2. On the contrary, the powers granted by Leo XIII concern only the *sick*, in danger of death.

3. Cf. *Collat. Brug.*, t. XIV, p. 443 s. ; *Collat. Gandav.*, t. I, p. 177 s. This interpretation has been authoritatively confirmed by the decree of the S. C. de Sacr., of 16 Aug. 1909 (see the text of it in the *Collat. Brug.*, t. XIV, p. 562 s.).

4. Of this opinion are *Il Monitore*, vol. XXI, p. 472 s. ; *N. R. th.*, 1909, p. 472 ; Wouters, o. c., p. 69 s. ; *Archiv f. k. Kirchenr.*, 1910, p. 594 ; Von Ernst, in the *Schweiz. Kirchenz.*, 1911, p. 68 ; De Arquer, o. c., n° 268 ; Ferreres, *Los Esponsales*, n^os^ 599 and 617 ss.; Arribas, o.c., p. 102 s.; Genicot-Salsmans, o.c., II, n° 500 ; Leitner², *Lehrb.*, p. 484 ; *Vie diocésaine*, 1913, p. 34. On the other hand, Vermeersch, *De Religiosis*, Periodica, V, p. 38 s. ; *N. K. Stemmen*, 1909, p. 336 ; Van den Acker, o. c., p. 69 s. ; Vogt, o. c., p. 158 ; Prümmer, in *Th. Pr. Quartalschr.*, 1912, p. 112 s. and 896, maintain the contrary opinion.

5. This text is given in the *Collat. Brug.*, t. XV, p. 581 s., where, in a note, are given the authors who share our view.

quently, in virtue of the faculties of which we have been speaking, parish priests can grant the above-mentioned dispensations, when they assist as parish priests at the marriage of persons one of whom is in imminent danger of death, provided there is danger in delay and it is a question of setting right matters of conscience or of legitimating the children (1).

II. **Parish priests** can receive yet other delegated faculties, in addition to those of which we have just spoken :

as well as to parish priests

A. In virtue of the declaration of the C. S. O., of 9 Feb. 1889, communicated by Encyclical Letter of March 1 following (cf. n° 358), *they can* be subdelegated *habitually* by the Bishop to dispense, within the limits of the indult of 1888, *sick concubinarii*, *in articulo mortis*, where there is not time for recourse to the Ordinary (2).

In the diocese of Bruges, this faculty was subdelegated to parish priests in 1892, with directions to give the Ordinary immediate notice of any case in which they may have granted a dispensation from a public impediment (3).

This power, restricted as it is in comparison with the wide faculties granted by Pius X, may, nevertheless, in certain cases be useful to parish priests in arranging marriages, where neither legitimation of children nor a question of conscience comes in.

B. In virtue of the *Pagella* of the S. Poenitentiaria, n° XI (see text of same in n° 360), parish priests *can* also be *habitually* subdelegated by the Bishop to dispense from *illicit affinity*, within the limits laid down.

On this point, the Bishop of Bruges subdelegated his parish priests in 1896, and granted them the faculty « of dispensing from the impediments of *occult illicit affinity* in the first degree, in the first degree mixed with the second, and in the second degree, in the case of marriages *to be contracted*, on condition that all the preparations for the wedding are already made, and that the marriage cannot be postponed *until a dispensation is obtained*

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1. It is necessary that there should be danger in delay so that there is no time for recourse to the Bishop.

2. The necessary time is wanting even when *telegraphic* or *telephonic* communication with the Bishop is possible, but not when an *express letter* could be sent and an answer received. Cf. *Collat. Brug.*, t. XII, p. 408, and above, n° 68.

3. *Collat. Brug.*, t. I, p. 102 s. ; t. V, p. 423 s.

from the Holy See (1), without danger of notable scandal ; care being taken to avoid the occasion of sin and to make sure that the relations of the prospective husband with the mother of the bride did not precede the birth of the latter ; a salutary penance being moreover imposed in every case » (2).

C. In the third place, considering the introductory formula of the *Pagella*, the Bishop can in like manner communicate *habitually* to his *vicarii foranei* (rural deans) all the faculties contained in the Pagella, observing the clauses found there.

Thus, in the diocese of Bruges, the *deans* ordinarily receive the faculty for *removing the prohibition of demanding the marriage debt* « in respect of the partner who, notwithstanding an (occult) vow of chastity taken in private (not in a religious Congregation), has contracted marriage » (3) ; likewise, « in respect of an incestuous husband (or wife) whose right (or rather leave) has been forfeited in consequence of occult affinity contracted through sexual intercourse with a relation of his (or her) partner in the first degree, or in the first mixed with the second, or in the second » (4).

D. Finally, the Bishop can delegate his *ordinary* powers of dispensing (see n° 357) with regard to the publication of the banns, the prohibition of marrying during the forbidden times, so far as this prohibition depends on diocesan law, and the *unreserved vows* : the incomplete or temporary vow of chastity, the vow of celibacy, the vow of entering religion in an order not strictly so called, and the vow of taking sacred Orders.

Here, the Bishop of Bruges grants his *deans* the faculty of giving a *dispensation by commutation (dispensandi commutando)* from the above-mentioned vows (5), both for marriages to be contracted and for the use of marriage already contracted. In addition to this, he delegates to them the power of dispensing the faithful of their respective deaneries from one or two publications of *banns*, from the impediment of the forbidden time, within

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1. A space of three weeks is considered sufficient for the certain and safe receipt of an Apostolic rescript. Cf. *Collat. Brug.*, t. XIII, p. 404.

2. *Collat. Brug.*, t.I, p. 381 s. See also above, n° 306, where we give an explanation of the clause concerning the possible relations of the prospective husband with the mother of the bride.

3. See above, n° 136.

4. See above, n° 138.

5. *Stat. Dioec.*, P. II, Tit. II, art. 6.

the limits laid down, and from the *intermediate day* between the last publication and the marriage, so far as this requirement of the law constitutes an impediment. (See n° 40) (1).

and confessors.

III. **Confessors.** A. *Every confessor* may receive a direct delegation from the Holy See, and have the *Pagella* granted to him through the S. Poenitentiaria. This *Pagella* for ordinary confessors contains various faculties, among others, those we have spoken of in II, under C, and that of dispensing from illicit affinity and from the impediment of crime, where there has been no attempt at murder, in both cases for the purpose of revalidating a marriage already contracted (2).

B. The formula of introduction to the *Pagella* granted to Bishops permits them to communicate their faculties also « to certain confessors specially subdelegated, for a period to be determined (by the Ordinary) ».

Again, in the diocese of Bruges, confessors appointed to hear confessions *during a mission*, are subdelegated to grant *dispensation by commutation*, (as mentioned above, in II, D), from the vow of chastity and from illicit affinity supervening during marriage, *in relation* to the right or permission to demand the marriage debt.

C. The Bishop can delegate to confessors the ordinary powers at his disposal *outside of urgent cases*, which powers we have just enumerated in II, D.

It is thus that the Bishop of Bruges habitually delegates his confessors to grant *dispensation by commutation* from the unreserved vows « on the days on which, according to the *Tractatus de casibus reservatis*... p. 22, under B, n°s 2, 3, 4, every confessor enjoys, within the territorial limits of his jurisdiction, the faculty of absolving from the cases reserved to the Bishop » (3). This same delegation is granted to confessors appointed for times of mission, as well as to the priests called to hear confessions on the occasion of the Eucharistic triduum (4).

D. Further, it seems that the Bishop, outside of the limits of his delegated faculties, can delegate his confessors, in virtue of the

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1. *Ibid.*, cf. n°s 40, 43 and 245, above.
2. Cf. PUTZER, o. c., n° 252 ; *N. R. th.*, t. XXIV, p. 633 s.
3. *Acta Congr. Prosyn.*, of 1901 ; in the *Coll. Brug.*, t. VI, p. 395.
4. Circular of the Bishop of Bruges, of 20 Jan. 1910.

ordinary power that he has *by presumed leave of the Holy See*, in particular cases *of urgent necessity* (1).

Applying this principle, the Bishop of Bruges has habitually delegated his confessors, in virtue of the said ordinary power, to dispense, in relation to marriages already contracted or to be contracted, from the *occult* impediment of *illicit affinity*, or of *crime* arising from adultery with promise of marriage, but without any attempt on the life of the partner : « in case of *urgent necessity*, and when *time is absolutely wanting for recourse (to the Bishop)* ; care being taken to avoid occasion of sin and to make sure that the intercourse, that the prospective husband may have had with the mother of the bride, did not precede the birth of the latter » (2).

This last faculty, therefore, extends to marriages *both contracted and to be contracted ;* it includes *illicit* affinity, even when *multiplex*, in any degree and in any line whatsoever ; as also *crime*, even *multiplex*, when there has been no attempt at murder (3), but not the case in which the two impediments of crime and illicit affinity *concur* (4).

Parish priests, as such, as already stated,have another, but less extended, delegated power, in relation to illicit affinity ; and they can make use of it when they have time to apply *to the Bishop*, provided there is not time for recourse *to the Holy See* (5).

Note. Regular confessors also ordinarily enjoy special powers communicated by indult, that is to say, by the *Pagella*. In addition, on the title of *privilege*, they possess the faculty : a/ of giving a dispensation *for claiming the marriage debt*, in favour of incestuous spouses or those who have broken their vow of chastity privately emitted (*De Religiosis — Periodica*, V, p. 37 and *Theol. und Glaube*, 1912, p. 32 ss.) ; b/ *of dispensing from the unreserved vows* (according to the most common opinion), and that even for the extra-sacramental forum of conscience. There are, however, some authors who deny them this second power, or rather restrict it to the

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1. We have upheld this opinion in the *Collat. Brug.*, t. XII, p. 410 s. and have appealed to the practice of other dioceses and to the extrinsic authority of several authors, notably of Leitner, *Lehrb.*, p. 507 ; of Wernz, o. c., IV, n° 619, note 87 ; of Planchard, *Dispenses*, n° 552 ; of Rousseau, o. c., p. 92 s, ; Rosset, o. c., n° 2404 ; of Giovine, o. c., I, par. 139, n° 10 ; of Gennari-Boudinhon, *Consultations — Morale*, II, cons. CXXVII, p. 364 s.

2. *Acta Congr. Prosyn.*, of 1907, in the *Collat. Brug.*, t. XII, p. 387, and cf. p. 407 ss.

3. That is to say, the impediment of crime arising from adultery with promise of, or attempt at marriage. Cf. *Coll. Brug.*, t. XII, p. 781.

4. *Coll. Brug.*, t. XII, p. 408.

5. *Ibid.*, t. XII, p. 411 ; t. XVI, p. 194.

faculty of granting a *dispensation by commutation* ; such is the opinion of Zugh, in the *Pastor Bonus*, t. XXIII, p. 39 ss. Others are still more strict, and recognise the said religious as having only simple power of *commutation* ; in this sense, see Rett, o. c. On this controversy may be consulted Vermeersch, *De Religiosis*, Periodica, V, p. 57 ss. ; Oesterlé, in the *Theologie und Glaube*, 1911, p. 389 ss. ; *Pastor Bonus*, t. XXIII, p. 289 ss. ; all three, with us, defend the broader view. Whence we may conclude that the common doctrine, up to the present at least, preserves its probability, and may consequently be followed in practice with perfect safety.

370. Delimitation of powers as to place and persons.

Observations concerning the *persons* to be dispensed, the *place* in which they can be dispensed, the *nature*, the *object* and the exercise of the faculties.

A. **Persons** and **places**.

1. *Priests* dispensing those in danger of death, according to the existing discipline, can do so *everywhere* and *in respect of all*.

2. *Parish priests*, in making use of their powers in relation to *dying concubinarii*, can (unless some restriction is made, which is not the case in the diocese of Bruges) grant such dispensations not only to their own parishioners, but to all *subjects of the diocese*, whether in the diocese or out of it (1).

If they have the faculty for dispensing from the impediment of *affinity*, they can use it only in favour of those of the diocese, and within the territorial limits of the diocese (2) ; moreover, in the diocese of Bruges, the exercise of this faculty is limited to their *respective parishioners only*. Cf. *Collat. Brug.*, t. V, p. 612 ; t. VIII, p. 188 ; t. X, p. 694 (3).

As to the faculties of *Deans*, in the diocese of Bruges, according to the statement made in n° 369, II, C and D, they can exercise them in respect

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1. *Coll. Brug.*, t. V, p. 474 ; p. 692 s. Observe, however, that if this faculty of granting *dispensation* is not geographically limited, the decree *Ne Temere* restricts the competence of the parish priests to his own parish as concerns *assistance* at a marriage. But, as we have said, the parish priest can again dispense from this provision, since the impediment of clandestinity is not excluded from the faculties granted by Leo XIII in 1888 ; and in this way he can assist at a marriage even outside of his own territory.

2. See above, n° 363, in note.

3. The limits relative to persons must be understood of the contracting parties whom the impediment affects *directly*. Cf. *Coll. Brug.*, XII, p. 409 ; t. VI, p. 681.

of all persons belonging to the diocese, within the territorial limits of their own jurisdiction ; if it is a question of members of their own flocks, they can use everywhere, even outside of the diocese, the faculties granted to them in virtue of the ordinary power of the Bishop, but not those granted in virtue of an indult. We must except dispensations from banns, from the forbidden time and from the intermediary day ; these are limited, by the very text of the concession, to the faithful of the respective deaneries, no matter where they may be staying at the time the dispensation is granted.

3. The powers of *confessors* are limited to the faithful of *the diocese* ; they can exercise them within the territorial limits of their own sacramental jurisdiction (1). But, if they are at the same time parish priests and it is a question of their own flocks, the exercise of their faculties is not limited to the diocese, always understanding the exercise of those faculties granted by the Bishop in virtue of his ordinary power.

B. **Nature** and **object** of the power :

The power that *parish priests* and, sometimes, even *simple* priests receive for dispensing *the dying*, is a power *for either forum*, the same as the corresponding faculties of the Bishop ; they can accordingly dispense for the external and the internal forum (and can do so out of confession) according to circumstances, i. e., according as the impediment is public or occult. The power that Deans have of dispensing from the banns, from the prohibited time and from the intermediary day, is a power for the external forum. *as to forum,*

All the other faculties enumerated above, in n° 369, concern the internal forum alone, and can be exercised only in sacramental confession (2).

The *object* of the faculties must be determined and their extent interpreted in accordance with the principles laid down in n° 362, 1 and 3 ; in other words, the power of dispensing includes that of *legitimating the children*, and the faculties *are to be interpreted widely*.

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1. Except confessors appointed in times of mission ; these can use their special faculties only in the parish to which they are sent.

2. Exception being made for the powers that *Regular* confessors possess, in virtue of a *privilege*, in accordance with the more common opinion.

and rules to be observed in the exercise of these faculties.

C. **Exercise** of the faculties. Observing due proportion, we must apply here the principles explained above in n^{os} 365 and following, as to the exercise of the Bishop's power. Consequently:

1. Should there simultaneously occur another impediment, for which parish priests, confessors or others have no faculty, they are then deprived of all power.

2. They can use the powers granted for urgent cases if, pending recourse to the Holy See or to the Ordinary, there supervenes some urgent necessity.

3. The priest must observe the style of the Curia, everywhere and in the measure that it has to be observed by the Ordinary, according to what has been said in n° 365 ; likewise for the clauses inserted in the act of concession.

4. When a parish priest has at the same time a power of dispensing subdelegated by the Bishop *in virtue of an indult*, and a power delegated by the Bishop *in virtue of his ordinary power*, which he holds by the presumed will of the Holy See, he must make use of the former, and not of the latter, in accordance with what we have said above, when speaking of the ordinary power of the Bishop. Consequently, when it is a question of dispensing from *affinity* for a marriage *to be contracted*, the parish priest must dispense his parishioners in virtue of the power subdelegated to him in 1896, even when time is wanting for recourse to the Bishop (1).

5. *Cumulative* dispensation can be given in virtue of the twofold faculty granted in favour of those in danger of death ; likewise in virtue of every faculty delegated or subdelegated by the *Pagella* of the S. Poenitentiaria ; but it is otherwise with the powers granted by the Bishop of Bruges with relation to affinity and crime, as we have already remarked.

6. All power of *subdelegating* is denied them.

7. As regards the cessation of their powers : the *habitual* powers, subdelegated by the Bishop to parish priests and confessors, *in virtue of an Apostolic indult*, remain in force at the death of the Bishop ; they are, as stated above, *gratiae factae*, and the indult, in

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1. *Cf. Collat. Brug.*, t. XII, p. 411 and 412, where we observe that practically there is little difference between the exercise of these two powers. Cf. especially *Collat. Brug.*, t. XVI, p. 194.

virtue of which the subdelegation was made, is not personal to the Bishop, but belongs to the Ordinary. Moreover, the faculties that confessors receive in the diocese of Bruges, in virtue of the ordinary power of the Bishop, also continue to exist at his death, because they are *gratiae factae* (1).

8. In case of *doubt,* not as to the fact of the granting of the faculty, but as to its value or scope, apply what has been said in n° 368.

Chapter III.

CAUSES OF MATRIMONIAL DISPENSATION.

Article 1. The causes of matrimonial dispensation in general.

371. Need of a proportionate cause for dispensing,

I. There *must* be a just and proportionate *cause* for dispensing ; this is always necessary for *licitness,* and even for *validity,* when an inferior dispenses from a law imposed by a superior. This is why, in the absence of a just cause, the Sovereign Pontiff himself dispenses invalidly from an impediment of the natural or divine law, and the Bishop or priest from every impediment of common law.

even under the existing discipline.

II. Formerly, as we have said, the discipline of the Church was much stricter than at present ; dispensations were more rarely granted, and only very grave reasons were admitted. If nowadays, owing to circumstances, the former rigour has been greatly modified for the common good of souls, it is none the less true that serious reasons, proportionate to the gravity of the impediment, are always required.

372. Causes, honourable or dishonourable ;

III. These causes are :

1. *Honourable* or *dishonourable,* according as they imply delinquency or otherwise. Thus, carnal intercourse and suspected familiarity are dishonourable causes ; while, on the other hand, smallness of place *(angustia loci)* and super-adult age are honourable causes.

final and impulsive ;

2. *Final* or *impulsive.* A *final* cause is a cause, or an accumula-

1. On the cessation of a *rescript,* apostolic or episcopal, to be executed by a priest, and the cessation of a power given for a particular case, see below, ch. VI, n° 402.

tion of causes, which brings about the granting of a dispensation in a determinate case, without which the dispensation would not be granted, at least in the same form and with the same extent. An *impulsive* cause is a single or manifold cause, without which the dispensation would have been granted, but not with the same promptitude and readiness.

canonical and non-canonical.

3. *Canonical* or *non-canonical*. A cause is *canonical* when, in accordance with canonical rules and the prudent judgment of the Church, it is sufficient to constitute a final cause, if not for a grave impediment, at least for a lighter one.

A canonical cause is, therefore, ordinarily final, but in respect of a determinate impediment, it may be insufficient. On the other hand, non-canonical causes are in themselves merely impulsive, since, taken separately, they are incapable of constituting a final cause for any impediment ; if, however, several such causes occur at the same time and are taken collectively, they may produce a final and sufficient cause.

373. How to decide if a cause is sufficient.

IV. To decide if, in relation to a given impediment and under the given circumstances, there exist final and sufficient causes, we must consider the status of the persons, and above all the nature and gravity of the impediment, while taking into account the practice and customs of the Roman Curia, which shows itself sometimes more and sometimes less severe in its estimation of the causes.

As regards the *status of the persons*, Rome is more indulgent in its dealings with those of noble birth and high position, and is so with a view to the general good, for which it is important that such families should be on good terms with the Church.

As regards *the nature and gravity of the impediment*, there is evidently need of a graver cause for a dispensation *of higher grade*, affecting the most important impediments, than for one *of lower grade*, applying to less serious impediments (cf. n° 351). Certain impediments require such a compelling cause of dispensation, that the Holy See never, or hardly ever, finds one sufficient, as we have remarked above (1).

Observe that among canonical causes of dispensation several per-

1. A fuller development may be found in Feye, o. c., n° 684 s. ; Pompen, o. c., n° 53. Cf. the notice issued by the Dataria, in the *Collat. Brug.*, t. I, p. 30 s.

sonally affect the intending parties, either the bride alone or both of them; others concern the public good, as for instance the preservation of peace.

Article 2. The Causes of dispensation in particular.

374. *Enumeration of principal canonical causes,*

The principal **canonical causes** are enumerated and briefly explained in the *Instructio S. C. de P. F.*, of 9 May 1877 (1). They are:

1. « **Smallness of place** (augustia loci), absolute or relative (applicable only to the woman). This cause exists when the relationship of the woman is so extended in *the place of her birth*, or even *of her domicile*, that she can find a husband of her own standing only among her kindred or affines, while on the other hand it would be painful for her to leave her native place ».

By *place* is here understood every *distinct* agglomeration of inhabitants: distinct in name and administration, as a town or commune; or distinct on account of distance, as for example a hamlet a quarter of a Belgian league (three quarters of a geographical mile) away from a village, or even less when communication is difficult. Cf. *A. S. S.*, XVI, p. 543.

A place is considered small if it does not contain more than 300 houses, or 1500 inhabitants, counting Catholics only, though it is well to mention in the supplica the number of non-catholics. The place *of birth* or that *of domicile*, or *both of them*, may be small; it is sufficient that one or the other should be so, but if one of them is not, the fact should be mentioned in the supplica. If both places are small, the expression *angustia locorum* is employed, though this has another sense in the *Formulas of the Dataria Apostolica* of 1901, Formula 26 and 30; in the same place, in Formula 18, is mentioned a third kind of cause in relation to smallness of place.

In order that the cause of *smallness of place*, here spoken of, may be fully valid, it is necessary that the young woman, at the time, *should not be asked* in marriage by any young man of like condition (as regards family, fortune and education), residing in the same place or at least willing to take up his abode there, except by one under an impediment. It is also necessary that the prospective husband should dwell in the same place and

1. *Collectan.*, n° 1482. The text is also given in the *Liber Manualis* for the diocese of Bruges, p. 172 ss.; see the commentary in the *N. R. th.*, X, p. 24 ss.; Pompen, o. c., n^{os} 34 ss.; as well as in the classical works, Pyrrhus Corradus, *Praxis Dispensationum Apostolicarum*, l. VII and VIII, and De Justis, *De dispensationibus matrimonialibus*, l. III.

intend to remain there ; since without this, there is no realisation of the reason for which a dispensation is granted in this matter, namely, that the young woman may not be compelled to leave those connected with her by ties of kinship and marriage.

If the conditions indicated are only imperfectly fulfilled, there is no need to dismiss all question of this cause, though under the circumstances, smallness of place cannot be alleged *simply* and without qualification. The circumstances must be explained. It will be stated, for instance, that the place has more than 1500 inhabitants, but that, considering her family position, the young woman has but a very limited choice, because there are hardly any young men of similar social standing ; so, in like manner, if the prospective husband belongs to another place, and intends to remain there.

Observe, finally, that this cause concerns the *bride* only, and cannot be invoked in favour of the man (1).

2. « **The woman's super-adult age,** that is to say, when a woman has *passed her twenty-fourth year* without finding a man of like condition to marry her. This cause does not hold good in the case of a widow who wishes to contract a second marriage ».

According to a reply of the S. Poenitentiaria, of 5 Apr. 1902 *(Collat. Brug.*, t. VII, p. 488), it is not absolutely requisite for the validity of a dispensation obtained on this ground, that the young woman should not as yet have found a man of like condition, but it is sufficient « *that she be certainly of super-adult age* » (2). After the age of forty, super-adult age is not admitted as a sufficient cause.

3. « **Want of or insufficiency of dowry,** if the young woman is not in *actual* possession of a sufficient dowry to enable her to marry, in the place in which she is living, a man of like position related to her neither by blood nor by marriage. This cause has yet more force, if the woman has no dowry at all, and a relation by blood or marriage is ready to take her to wife, or even to assign her a suitable dowry ».

4. « **A lawsuit already begun with regard to an inheritance,** or

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1. Accordingly, when a Catholic man requires a dispensation in order to marry a non-catholic woman, smallness of place cannot be alleged, because, as the dispensation directly affects the man, this cause would then be invoked in his favour.

2. To avoid all error, the Bishop of Bruges, *Lib. Man.*, p. 188, has enjoined that : « If *aetas superadulta* is alleged on behalf of the woman, her baptismal certificate must be attached to the petition ».

the *serious* or *imminent danger of such proceedings*. If the woman is engaged in a lawsuit about an important inheritance, and no one is willing to take the matter in hand and defray the expenses, except the man who wishes to marry her, it is customary to grant a dispensation ; for the general good demands that legal proceedings should not be prolonged. Closely connected with this cause is that of *a legally contested dowry*, when a woman has no one else willing to assist her in recovering her property. But such a cause suffices only for the remote degrees ».

5. « **Poverty of a widow** burdened with a numerous family, that the man promises to provide for. Sometimes also a widow is dispensed simply because she is young and in danger of incontinency ».

According to the Instruction, this cause is canonical only in the case of a *widow*, and not in that of a widower, or of an unmarried woman who has had illegitimate children. It is necessary to mention the number of children ; the greater the number, the stronger the cause ; but one child alone might suffice when there are other favouring circumstances. The widow is supposed to be in poverty, which increases for her the difficulty of finding a husband. This cause of dispensation is reckoned among the grave causes. Moreover, *in accordance with the less rigorous practice at present in force*, the Holy See frequently dispenses in favour of a *widower*, even if he has but one child.

6. « **The advantage of peace**, by which are understood not only alliances between states and princes, but also the cessation of serious private enmities, quarrels and hates. This cause is invoked for the purpose of putting an end to grave dissensions that have arisen between the relations by blood or marriage of the contracting parties, and that would be set at rest by the marriage ; or again, to cement a peace already renewed between blood-relations or affines after grave enmities ».

7. « **An excessive, suspected, dangerous familiarity**, and also a **dwelling together** under the same roof, that is not easily preventable ».

8. « **Carnal intercourse** had with a woman related by blood or affinity or with some other person who is under an impediment, *subsequent pregnancy*, and consequently *legitimation of offspring*, for the purpose of safeguarding the interests of the latter and the honour of the woman, who would otherwise remain without a

husband. This cause is one of the most urgent, and, on account of it, it is customary to grant a dispensation even to those of the lowest class (provided they have not acted thus precisely for the purpose of obtaining a dispensation more easily ; should this be the case, it would have to be mentioned in the petition) ».

This is, then, the most urgent cause for dispensing from the graver impediments, and the pregnancy of the woman is evidently of greater importance than the fact of the intercourse.

The *sexual intercourse* here spoken of is such as is *notorious* or soon to become so, since it is a question of the young woman's loss of reputation and the consequent difficulty of finding a husband. Secret intercourse, however, may also be alleged as a reason and will sometimes be admitted as sufficient, either on account of the imminent danger of incontinency which it supposes, or because there is then some special reason why the woman should marry her accomplice.

Pregnancy constitutes an urgent cause of dispensation in favour of the woman, for saving her reputation ; in favour of the offspring, requiring legitimation ; and for the public good, through the lessening of the scandal.

One may at the present time omit what is placed in brackets, viz. the necessity of mentioning the fact, if the guilty couple have sinned in order to obtain a dispensation more easily thereby. There is no longer need to make mention of this circumstance, since the decree of the C. S. O., of 25 June 1885 (see below, n° 382), and that of 18 March 1901, declared « that matrimonial dispensations, whether for marriages invalidly contracted or for marriages to be contracted, are without distinction valid, even if the carnal intercourse or *the design and intent of thereby obtaining the dispensation more easily have been passed over in silence* ». *Collectan.*, n^os^ 1495 and 1500.

9. « **Evil repute of the woman,** *arising from the suspicion* that, being on too intimate terms with a blood-relation or affine, she has had carnal intercourse with him, *though the suspicion be false* ; since, if the marriage did not take place, such woman, being gravely defamed, would remain unmarried, or would have to marry a man of lower condition, or would be exposed to serious loss (1) ».

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1. Thus it is not necessary that unlawful intercourse should have really taken place ; it is enough that there should be a *suspicion* ; but this suspicion must rest on facts that are public, as is the case, e. g., when it is well known that kissing, embracing and the like, capable of giving rise to rumours of this kind, have occurred between the persons concerned.

10. «**The revalidation of a marriage**, contracted *in good faith and publicly*, according to the regulations of the Council of Trent (or of the Decree *Ne Temere*); because it could hardly be dissolved without public scandal and grave injury, especially to the woman (c. 7, *de Consanguin.*). But, *if* the parties have contracted *in bad faith*, they do not in any way deserve the favour of a dispensation, as the Council of Trent says, *Sess. XXIV, c. 5, de Reform. Matrim.*».

Thus it is a question of a marriage contracted *in the form of the Church* and *in good faith*, at least on one side. If there was bad faith on both sides, it would certainly be more difficult to obtain a dispensation; but under the existing discipline it would not be refused, especially if there were children by the marriage, and the civil formalities had been complied with. The bad faith must be mentioned in the supplica as a *circumstance*, in accordance with the directions given in the second part of the Instruction, n° 6, together with the other circumstances; that is to say, it must be stated if the marriage was contracted « in the hope of obtaining the dispensation more easily; and if it has been consummated in this bad faith, at least on one side, in other words, with knowledge of the impediment ». Cf. below, where we speak of the points to be specified in the supplica, ch. IV, n° 381.

Where it exists, marriage already contracted is always put forward as a cause, since it must in any case be mentioned in the supplica *as a circumstance.*

11. « **Danger of a mixed marriage**, or *of the celebration of the marriage before a non-catholic minister.* Where there is danger that those who wish to contract marriage, even in a near degree of relationship, will, if refused, in contempt of the Church's authority, present themselves before a non-catholic minister, there is just cause for dispensation, not only on account of the scandal that would be given to the faithful, but also on account of the danger of the perversion and apostasy of the contracting parties, especially in countries where heretics enjoy full liberty.

The S. Congregation so declared in an instruction addressed to the Archbishop of Quebec, 17 Apr. 1820. In like manner the Vicar Apostolic of Bosnia, having asked if he could grant a dispensation to certain Catholics, whose only reason was their infatuation, when he foresaw that in case of refusal they would get married before an infidel magistrate, the S. Congregation of the Holy Office decided, 14 Aug. 1822, 'that answer must be given to the said Vicar Apostolic to use the powers granted him under Form.

II, as he thought right before God'. The like must be said when there is danger of the Catholic party marrying a non-catholic ».

12. « **Danger of incestuous concubinage.** It is clear from the Instruction of 1822, referred to above, that use must be made of dispensation to prevent a man from wallowing in concubinage to the scandal of all and to the evident risk of his own eternal salvation ».

13. « **Danger of a purely civil marriage.** It follows from what has been said, that the probable danger that persons, asking for a dispensation and not obtaining it, will contract a so-called purely *civil* marriage, is a legitimate cause of dispensation ».

It is necessary to indicate in the supplica the reason that gives rise to the fear of a civil marriage : if, perchance, the petitioners have manifested this intention, or if the circumstances only render it probable, so that no difficulty may arise in connection with the imposition of the penance ; it must also be stated if the fear is really well founded and to what extent. As a general rule, however, one must not yield to the threats of the petitioners to contract civilly, if the dispensation is not granted. This holds good equally in respect of the causes indicated in n^{os} 11 and 12.

If the civil ceremony *has already taken place*, there is evidently a very urgent cause for dispensation ; but the sole fact of having sought a civil dispensation is not regarded as a canonical cause, except in so far as the danger of a purely civil marriage ensues, which is commonly the case.

14. « **The removal of grave scandals** ».

15. « **The cessation of notorious concubinage** ».

16. « **Remarkable merit** *(excellentia meritorum)*, if one has rendered great services to Religion in combating the enemies of the Catholic Faith, or by his liberality towards the Church, by his science, his virtue, or in any other way ».

Besides the sixteen which we have just enumerated, there are yet other *canonical causes*, as the Instruction itself points out. Several of them are mentioned in the *Formulas of the Dataria Apostolica* : « difficulty of communication... the small number of young men, e. g., after a war ; the protection of the Catholic religion ; the hope of bringing the partner to the true faith ; the desire of keeping property in a family ; the desire to perpetuate an illustrious race or dynasty ;... or of preserving families from decay » (1).

1. For the interpretation of these formulas, cf. *Das Dispenswesen in Ehesachen f. d. Erzdiözese Freiburg*, in *Archiv f. k. Kirchenr.*, 1911, p. 494 ss.

Observations.

375. *Practical observations.*

1. It follows from what has been said in article 1, that, in addition to the canonical causes, there are yet other causes that may be invoked as confirmatory and impulsive ; moreover, even in the absence of a canonical cause, several non-canonical causes, which, when taken separately are merely impulsive, are capable, when united, of forming a final cause.

Of such a kind are, e. g., danger of seduction in respect of the woman seeking a dispensation, orphaned state, physical infirmity or deformity, infatuation, advancing age of a young widow, the necessity for a man to have a wife to take care of his household, mutual help of the applying parties advanced in age, and the divulged intention to marry (1). There are also causes that very nearly fulfil the canonical conditions, if, e. g., the young woman is 23 years of age, or if the place contains a little over 1500 inhabitants.

2. Dispensations are also given by the Holy See under the general formula « *for certain reasonable causes* » (ex certis rationabilibus causis), or the like. Dispensations thus granted are sometimes called dispensations *sine causa,* not because there is no sufficient cause, but because none is specified in the rescript.

Sometimes Rome does not express any determinate cause, either because no strictly canonical causes have been alleged (2), or because it does not require their verification for the validity of the dispensation, as is the case, under the new discipline of the Roman Curia, for dispensations from impediments of the lower grade (3). It also omits to specify its reasons when the dispensation is granted in view of a large *componenda,* or to gain the good

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1. *Das Dispenswesen,* l. c., p. 498.

2. Cf. Feye, *De Imp.*, n° 669.

3. Thus acccording to the *Normae Peculiares,* c. VII, art. III, n° 21, « Dispensations from minor impediments shall all be granted *for reasonable causes approved by the Holy See ;* under this form they will have the same force as if given in virtue of a motu proprio and with certain knowledge, and so will not be open to question on the ground either of obreption or of subreption ». Cf. Ojetti, *De Rom. Curia,* n° 49, and below, n° 403. This rule expressly applies only to dispensations granted by the S. C. de Sacramentis, but it can be extended, with some probability, to dispensations of the S. Poenitentiaria, and even to episcopal dispensations. See Genicot-Salsmans, o. c., II, p. 715.

will of the great, or « on account of unlawful intercourse or dishonourable acts that, for the good name of the petitioners and having regard to their position, it is not expedient to make known » (1).

3. If there are sufficient *honourable* causes, it is well to omit purposely dishonourable or defamatory causes that it is not necessary otherwise to make known, e. g., as circumstances. In this way one avoids the onerous conditions and does not bring dishonour on the guilty party with the author of the dispensation. It is especially fitting to observe this caution when there are occult defamatory causes that have not to be divulged, or when there is good reason to fear that the conditions that would be imposed for such causes would be badly received.

Chapter IV.

PETITIONING FOR A MATRIMONIAL DISPENSATION.

Scheme.

Preliminary observation. The impediment, if any, is frequently discovered by the parish priest or by the confessor. In this case, the parish priest or confessor should first see if it is in his own power to grant a dispensation in virtue of the powers at his disposal ; if so, he will grant the dispensation in accordance with the rules that we shall give in chapter V ; in the alternative, he will find out if there is any other parish priest or confessor with the requisite faculties, to whom he can send the party concerned to obtain a dispensation (2).

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1. The form then is : « *for certain special reasonable causes influencing the petitioners and made known to Your Holiness* ». Such are the *Formulas* of the Dataria, in which it is mentioned, at the end, that a dispensation of this kind « is granted rarely and only to Princes, those of exalted rank and other persons of position... ; then it is not necessary to verify the cause not expressed in the supplica, but only the other points there set forth, i. e., the impediment and the rank of the persons named in the petition, in other words, the points given there as conditions ».

2. Thus, if a confessor discovers that his penitent is under an impediment of illicit affinity, and he cannot himself dispense him because, for instance, he is not parish priest, and time is wanting for recourse to the Holy See, but not to the Ordinary ; or, again, should he be parish priest, but the penitent not of his parish ; in such a case, he can refer the penitent to his own parish priest, but he

If he can neither give the dispensation himself, nor refer the person concerned to another priest without grave inconvenience, or without running the risk of breaking the seal of confession, he must have recourse to the Bishop or Ordinary, or to the Holy See. We shall, accordingly, speak now of this recourse, and we shall inquire, 1. when it is necessary to have recourse to the Holy See, when to the Bishop, and for what forum ; 2. whose place it is to take the initiative ; 3. how this is to be done. In connection with this last point we shall consider the question of cost and expenses.

ARTICLE 1. **To what Authority, and for which Forum, recourse must be had.**

376. *It is necessary first to find out for which forum recourse must be had ;*

I. It is necessary first to inquire **to which forum** the impediment discovered belongs. If it is *of the internal forum*, i. e., occult in its nature and in fact ; or *of the external forum*, i. e., public in its nature and in fact (n° 235) ; or if, perchance, it is a case of impediments *of both kinds* occurring together.

If the impediment is *of the internal forum*, a dispensation must be obtained for the forum of conscience, in the form proper thereto. If it is an impediment *of the external forum, per se and as a rule*, a dispensation must be obtained for the external forum. If an impediment *of the external forum* and an impediment *of the internal forum* occur simultaneously, a double dispensation must be asked for: for the external forum, in the case of the former, and for the internal forum, in the case of the latter, mention being made in the second petition of the impediment of the external forum ; so that, in the act of dispensation, the dispensation invalidly granted for the external forum, owing to an occult defect, may be at the same time revalidated for the internal forum.

We say here ; « *per se and regularly* » it is necessary to obtain a dispensation for the external forum in the case of impediments belonging thereto ; for we have to bear in mind the exception pointed out above, in n° 346, 2. ; cf. n^{os} 351, 355, 361 and 366.

377. *secondly, if recourse is to be had to the Holy See or to the Ordi-*

II. In the second place, one must inquire if recourse is to be had to the **Ordinary** or to the **Holy See**. The principles set forth in chapter II lead us to the following conclusions :

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must be very careful *not to violate the secrecy of the sacrament.* Cf. *Collat. Brug.*, t. V, p. 612 ; VI, p. 553 s. ; VIII, p. 188 and XII, p. 411.

nary : a/ apart from a case of urgency,

A. **Apart from a case of urgency** (that is to say, when there *is time for recourse to the Holy See*), the *Bishop* or *Ordinary*, besides the prohibitive impediments from which he can dispense in virtue of his ordinary power, viz., the banns and the unreserved vows :

1. Can also dispense, *for the external forum*, in virtue of the quinquennial faculties of the S. C. de P. F., from consanguinity and affinity in the third and fourth degrees, from spiritual relationship of compaternity, from public decency consequent on occult betrothment, and from crime without attempt on the partner's life, within the limits laid down above, in n° 359 ; moreover, by special indult, he can here *cumulate* [1].

2. He can dispense likewise, *for the internal forum*, in virtue of the Pagella of the S. Poenitentiaria, for the revalidation of a contracted marriage, from the occult impediment of crime without attempt, and from illicit affinity, and can do so cumulatively.

3. Finally, *when there occur simultaneously* an impediment *of the external forum* and an impediment *of the internal forum*, from which he can dispense separately, as stated in 1 and 2, the Ordinary can dispense from both at once, for the external forum in respect of the former, and for the internal forum in respect of the latter, at the same time revalidating, for the internal forum, the dispensation invalidly granted for the external forum [2].

Beyond these limits, recourse must be had to the *Holy See*, i. e., to *the S. Poenitentiaria, for the internal forum* (having regard to its competence as pointed out above), and to *the S. Congr. de Sacr., for the external forum*, except in the case of the impediments of disparity of worship and of mixed religion, from which the Holy Office dispenses, and of the vow of chastity, taken in religion, for which application must be made to the *S. Congr. of Religious* [3].

Should there be two impediments, each pertaining to a different Congregation, recourse will be had at the same time to the Congregation for the external forum, and to that for the internal forum, in the manner indicated, and as we shall explain more fully below.

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1. We have in view the faculties granted to the Belgian Ordinaries ; we have seen above, n° 359, that the Bishops of England have wider faculties at their disposal.

2. Cf. above, n° 367 ; *Collat. Brug.*, t. VIII, p. 190 ss., where we have given a juridical explanation of this course of action.

3. We preclude from the powers of the S. C. for the Affairs of the Oriental Rites, of which we have spoken above, in n° 351.

B. **In a case of urgency,** *when there is time to apply to the Ordinary, but not to the Holy See :* *b] in a case of urgency.*

Recourse must be had to the *Ordinary,* who, in the circumstances, has various delegated powers (mentioned in nos 358 and following), especially with regard to dying concubinarii, and who has, besides, in case of urgency, a very extensive ordinary power in the matter of impediments occult by nature and in fact, and even with regard to certain impediments that are by their nature public, within the limits laid down in nos 355-357 ; but careful attention must be given to what has been said in nos 364 and 366.

In accordance with what has been said in no 363, application must be made to the *proper* Ordinary of the party to be freed *directly* from the impediment ; that is to say, to the Ordinary of the Catholic party, if one of the two is not a Catholic, or to the Ordinary of the party directly affected by an absolute impediment, or to that of either of the parties, if both are Catholics and affected by the impediment. In this last case, if the parties belong to *different dioceses,* recourse should be had to the Bishop of the *woman,* or, if it is a question of a defamatory impediment, to the Bishop of the guilty party.

Observation. With regard to recourse to the Holy See, it is well to remark that at various times in the course of the year, the Roman Administration is in vacation, in accordance with the regulations introduced by Pius X, *Normae Communes,* c. V ; in particular, besides the days kept as holidays, from the 10th of September to the 31st of October. A convenient arrangement has, however, been made, by which « on holidays, those in charge of the Congregations and Tribunals shall see that one of the staff is present at the office to attend to current business » ; and during the Autumn vacations, « there shall be no stoppage of work, but in each department there shall be a sufficient number of clerks of the higher and lower grade to attend to urgent matters of ordinary business ».

Scholion. The Perplexed Case *(Casus Perplexus).*

378.

A case may occur of such urgency that it is impossible to apply to the Ordinary, even by telegram, before the celebration of the marriage (on recourse by telegram, see below, no 385). *How to act in the perplexed case.*

If, in these circumstances, the parish priest or confessor has not the requisite powers, as described above, and if the marriage cannot be postponed, because the impediment is occult and defam-

atory, we have then what is commonly called *the perplexed case.*

To solve it, the following rules must be observed :

1. If *both the parties* are *in good faith* and ignorant of the existence of the diriment impediment, *they are to be left in that state* and the marriage celebrated. The marriage must be afterwards revalidated either by a simple dispensation, or by a sanatio in radice, as may seem expedient, unless it is better definitively to leave the reputed husband and wife in good faith, in accordance with what we shall say below, in the second Section.

2. If *both parties know* of the impediment, or if one at least knows of it and the other may easily be informed of it, as is commonly the case with the impediment of crime, they must be admonished to contract marriage *under condition of obtaining a dispensation* (1) ; and the confessor will make every effort to secure an episcopal dispensation in the course of the day and to communicate it to the contracting parties (out of confession), imposing upon them the requisite obligations. In this case, according to the principle laid down in n° 87, it would be necessary to renew consent, in the way indicated below, in n° 410.

If a dispensation cannot be hoped for before the next day, it will be necessary to obtain from the parties a promise to abstain altogether from the use of the marriage, until they are informed of the receipt of the favour.

3. If *one* of the parties declares in confession that he *has knowledge* of the impediment, and *that he cannot inform the other party of it without grave inconvenience : the marriage must then be proceeded with without hesitation.*

Almost all Authors are in agreement on this point, because it is urgently necessary to avoid the danger of very grave disgrace to the parties, of scandal among the people, and also of injuring the secrecy of confession ; but there is considerable diversity among them in *the juridical explanation of this practice.*

Many Authors justify it by saying that this ecclesiastical law, when it gives rise to such difficulties, lapses *ex epikeia*, not *in so far as it is invalidating*, but *in so far as it is prohibitive ;* and that it is, therefore, then *per-*

1. The confessor will instruct his penitent as to the course to be taken, charging him to make it known in turn to his accomplice.

missible to contract an *invalid* marriage, on condition that a dispensation is sought as soon as possible to revalidate it.

But this distinction seems somewhat fantastic and, besides, the proposed solution is defective and incomplete. It might hold good for the case in which a dispensation could be obtained before the end of the day and duly communicated to the reputed husband and wife ; but it is altogether insufficient when a dispensation cannot be obtained before the next day, and when the party acquainted with the impediment cannot in any way hold back from the consummation of the marriage (1).

Consequently, unless one is ready to permit the known and formal illegitimate use of the marriage, it would be necessary either to declare the marriage valid, or to compel the partner acquainted with the matter to defame himself by making it known to the other, which seems to us an exceedingly harsh proceeding.

No other course, therefore, remains except to adopt in this urgent case the solution that St. Alphonsus seems to suggest (2), namely, that the ecclesiastical law lapses, *ex epikeia*, even *in so far as it is invalidating*.

Those who hold the opposite opinion (3) object that *invalidating laws do not admit of epikeia, except for a reason of public good*, and, consequently, only in cases of common need (4) ; but this principle does not appear to upset the probability of this solution.

To begin with, the principle directly concerns the cessation of an invalidating law, by epikeia, in a *public case*, where the common good would suffer by this public breach of the law ; but here, on the contrary, it is a question of a cessation altogether secret.

Moreover, it is greatly to the general good that,under the circumstances, the Church should not uphold its law. Otherwise, as we have seen, the only solution would be to force the party who knows of the impediment to acquaint his partner with it, to the great injury of his own good name. If, too, the confessor had to put his penitent under the obligation of making such an avowal,there whould be much reason to fear that confession would thereby be rendered odious, and that the faithful would have less confi-

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1. Likewise, the solution proposed by some other Authors, namely, that the party conscious of the impediment should give consent under condition of obtaining a dispensation, would hold good in the former case, but not in the latter. Cf. Genicot-Salsmans, o. c., II, n° 468.

2. *Theol. mor.*, L. VI, n° 613. Feye gives a criticism of the solution of St. Alphonsus, *De Imp.*, n° 644.

3. Cf. Feye, o. c., n° 646 ; *Mélanges théologiques*, Sér. 2, p. 56-58 ; 486-493.

4. See above, n° 238.

dence in seeking the priest in the tribunal of penance and laying open to him the secrets of their hearts. All these considerations surely concern the public good (1).

Authors here observe that *afterwards*, for greater propriety and to show more respect for the law of the Church, it is right that the confessor should have recourse to the Bishop and lay the whole matter before him, for the purpose of receiving his directions ; this recourse is not, however, of obligation, except in the case in which the impediment becomes public, when it would be necessary to obtain a dispensation for the external forum (2).

Observation. *The perplexed case* can rarely occur in the diocese of Bruges, for, as we have seen, all confessors there have the power of dispensing from illicit affinity and from crime arising from the promise of marriage. It may, however, present itself when, for example, the two impediments are met with in the same case, when there is crime with attempt on the partner's life, or when the penitent belongs to another diocese. Cf. also below, n° 411.

Article 2. By whom Recourse is to be instituted.

379. By whom recourse is to be had to the Holy See,

I. If an **Apostolic Dispensation** is to be obtained :

1. *For the external forum*, the rule is, in Belgium, that recourse be had, on behalf of the petitioners (3), *through* the *agency of the*

1. Accordingly, the reason on which the probability of the opinion admitting epikeia rests, is not only, as the *Mél. théol.*, ll. cc. would have it, that the law becomes hurtful, but also that, in the hypothesis, the cessation of the law is the one and necessary means of avoiding the gravest and most pressing inconveniences of private and even, in a certain measure, of public order.

Moreover, the very Authors who, like Feye, *De Imp.*, n° 646, 4 and 649, 2 ; Wernz, o. c., IV, n° 619, note 87 ; De Becker, *De Matr.*, p. 380 s. ; Theol. Mechl., o. c., n° 101, theoretically attack the opinion of St. Alphonsus, practically recommend this solution as a last resort. We have, too, on our side Leitner, *Lehrb.*, p. 508 ; Gasparri, o. c., n° 768 ; Zitelli, o. c., p. 111 ; Rosset, o. c., n°s 2402 s. ; Lehmkuhl, o.c., II, n° 826 s. ; *R. th. fr.*, 1902, 162 : *R. ecclés. de Liège*, III, p. 108 s. ; Ojetti, *Synopsis*, V° *Impedimenta matr.*, n° 2386. This solution is also proposed in the *Acta Conc. Plen. Amer. Lat.*, n° 600.

Gennari-Boudinhon, *Consultations-Morale*, Cons. C. XXVII, n°s 5-9, vindicates at length this same solution, and extends it, perhaps further than is right, to cases in which the impediment is indeed occult in fact but public by nature, or in which it is materially public but formally occult. *Ibidem*, n°s 12 and 13.

2. Cf. Gennari-Boudinhon, l. c.

3. The favour is asked in the name of *both* parties, if both are Catholics, and the impediment is common to both, and does not arise from the fault of one only of the parties ; in the name of *one only*, when one only of the contracting parties

Ordinary (1). Regularly, the Ordinary of the place of domicile or of quasi-domicile (2) himself draws up the supplica and forwards it to the Holy See. *The parish priest,* normally that of the bride (3), must lay the matter before the Ordinary in a provisional supplica, in which he sets forth all the elements that are to enter into the supplica of the Ordinary, requesting him to obtain a dispensation from the Holy See. *for the external forum ;*

2. *For the internal forum,* recourse is had regularly through the *agency of the confessor,* who, in the name of the petitioners (4), asks for a dispensation directly from the Holy See. There is, however, no reason why the confessor should not send his letter to the Ordinary, asking him to forward it to Rome ; he may also, but without breaking the seal of confession, put the matter in the hands of the Ordinary, for him to draw up the supplica to be sent. This is the most usual course, but the restriction to be mentioned in n° 384 must be borne in mind. *for the internal forum.*

II. For an **Episcopal dispensation,** the interested parties make use of the agency of the *parish priest,* if it is a question of the exter- *By whom recourse is to*

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is a Catholic or under an absolute impediment, e. g., that of vow or Orders, or if it is a question of a relative impediment resulting from the fault of one alone. If both the parties are severally bound by an absolute impediment, recourse must be had for each of them by a *distinct supplica.*

1. Ordinarily the faithful do not have recourse by themselves, though they are able to do so. Cf. *Normae Communes,* c. X, n° 1 : « Each of the faithful has free access to the Congregations of the Holy See, the proper form being duly observed ; and his business can be dealt with directly ». Cf. PERATHONER, *Der Geschäftsverkehr,* l. c., p. 742 s.

2. The Ordinary of the place of origin, as well as that of the place of domicile, can also have recourse, but custom decrees that the supplica be sent by the latter. To be precise, it is the Ordinary of the Catholic party, if that party is under an absolute impediment, or, if there is question of a relative impediment, the Ordinary of the bride, or of the guilty party, who institutes recourse.

3. Sometimes the duty falls on the parish priest of the *bridegroom* in accordance with what we have said regarding the Ordinary, namely, when the impediment affects the man only, or rests on a fault committed by him and known to the parish priest, or, again, if the man alone is a Catholic.

4. The dispensation must be asked for in the names of both parties ; or in the name of one alone, if the impediment affects only one of them, or if being common to both, it arises from the delinquency of one. Fictitious names must be employed.

be had to the Ordinary.

nal forum, and that of the *confessor*, where the internal forum is concerned ; these apply to the Bishop or Ordinary for the dispensation.

Article 3. How recourse is to be had.

380. Practical advice.

Preliminary observation. What follows directly concerns *dispensations from Rome* and the supplica which is to be transmitted to the Holy See by the Ordinary or by the confessor ; but it applies also, in due proportion, to *episcopal dispensations*. For the latter also, in essentials, the employment of the style of the Curia is necessary for the *validity* of the dispensation ; in subordinate points it is required for the *licitness* of the act, when the Bishop makes use of his delegated power, and *propriety* demands it when he employs his ordinary power, as stated in n° 365, C. The parish priest, too, must follow the rules we are about to give, in drawing up the provisional supplica in which the matter is explained to the Ordinary with a view to the drawing up of the definitive supplica to be sent to Rome (1). We shall treat successively of the points to be inserted in the supplica and of the drawing up of the same, pointing out, as occasion requires, the diocesan regulations bearing thereon.

I. Points to be put in the supplica.

A. **For the external forum :**

381. Points to be put in the supplica for the external forum :

According to the second part of the Instruction of the S. C. de P. F., of 9 May 1877, by law, or by custom, or by the style of the Curia, the following points are required to be expressed, « so that if even unwittingly the truth is concealed or a false statement made, the dispensation is null » :

name,

1. « **The name and the fore-name** of the petitioners (2), both to be written distinctly and clearly, and without any abbreviation ».

Error as to the name or fore-name entails the nullity of the dispensation,

1. « In the supplica addressed to the Bishop for the purpose of obtaining a dispensation of this kind, it is necessary to express all that would be required if the supplica were sent to the Dataria (or now to the S. Congr. de Sacr.) or to the Poenitentiaria Romana ». *Lib. Man.*, p. 188.

2. The name will be given as in the Baptismal Register. If there are several names, the one most commonly employed will be chosen.

as is clear from the terms of the Instruction just cited, no less than from the *Adnotationes ad Formulas Datariae Ap.* (1), and from the indult customarily granted to Bishops for revalidating dispensations invalid on this head (2). The error is understood to be one that makes the identity of the person doubtful, and not one that is purely accidental and involves no uncertainty (3).

2. « The diocese of origin or of actual domicile ».

diocese,

It is sufficient to give the diocese of origin *or* that of domicile or of quasi-domicile; generally the diocese of domicile, both of the man and of the woman, is given (4).

Error in naming the *diocese* of domicile or of origin does not invalidate the dispensation, if it affects only *one* of the parties (5), but does so, if it affects them *both*. It should be remarked that, if the diocese of domicile has been correctly stated in the supplica, the validity of the rescript is unaffected by change of domicile on the part of the contracting parties before the execution of the dispensation received from Rome. Cf. below, n° 388. It might be said, not without probability, that error in giving the diocese of origin or domicile, even if it affected both parties, would not invalidate the rescript, unless such error involved an error in determining what Ordinary was deputed for the execution of the rescript or for the dispensation in a particular case.

The name of the *parish* is not required, not even when the cause alleged is smallness of place. Cf. the authors cited by Pompen, o. c., n° 22.

species of impediment,

3. « **The exact species of impediment** : whether it is consanguinity or affinity, arising from licit or illicit intercourse, public

1. « The names and fore-names of the petitioners must be expressed for the validity of the dispensation ».

2. Among the quinquennial powers recently (1913) granted by the S. Congr. de Sacr. to the Bishop of Bruges, is the faculty « of revalidating dispensations from any impediment, sent by the same S. Congr., that may be null on account of error as to the name or fore-name of the contracting parties ». Cf. *Collat. Brug.*, t. XVIII, p. 238 ss.

3. Change of a syllable or of a single letter may involve substantial error, if it is such as to alter the name notably according to the common way of thinking, e. g., if Jonson were written for Jobson, or Speke for Spike. On the other hand, the change of a letter may merely amount to an accidental change, as White for Whyte, Farleigh for Farley, and so forth. Cf. Giovine, o. c., II, Cons. XXVII, par. 2; Gennari-Boudinhon, *Consultations-Morale*, Cons. LXXVI.

4. The parish priest indicates the diocese of domicile, in his report to the Ordinary, when he uses the expression « my parishioner ».

5. S. Poenitentiaria, 6 Feb. 1896; *N. R. th.*, XXVII, p. 266 s.

decency based on betrothment or on a marriage ratum ; for the impediment of crime, whether it arises from conjugicide with promise of marriage, from conjugicide with adultery, or merely from adultery with promise of marriage ; for spiritual relationship, whether it is a question of sponsor and child, or of sponsor and parent of the baptized ».

Reference to what has been said above in connection with each of the impediments will make the reason of these requirements quite clear.

Error in expressing the impediment, or in determining the species of the same, invalidates the dispensation, even when such error is due solely to the carelessness of the secretary or the copying-clerk at Rome. Cf. *Collat. Brug.*, t. X, p. 69.

degree and line,

4. « **The degree** *of consanguinity* or *of affinity* or *of (public) decency* arising from a marriage ratum ; whether it is simple or mixed, not only the remoter degree but also the nearer. The **line** ; whether direct or collateral ; likewise, if the petitioners are connected by a double tie of consanguinity, on the father's side and on the mother's side ».

With regard to this, it is necessary to observe : a/ that, as a general rule, dispensation is invalid if a remoter degree is put down in place of a nearer, and also, probably, if a nearer degree is put down in place of a remoter (1) ; b/ when the degree is *unequal*, it is necessary to express the nearer, even for validity, if the first degree comes in, and also if it does not, when the matter is before the S. Poenitentiaria (2) ; c/ where the first degree comes in, one must show (though this is not necessary for validity) whence

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1. The S. C. de P. F. hinted this, 7 June 1853 (*Collectan.*, n° 1238) : « The faculty of dispensing from the second degree mixed with the first does not include that of dispensing from the first degree mixed with the third ». We could also allege, in favour of the doctrine proposed, a case that occurred in the diocese of Bruges, in 1911. When a dispensation was sought at Rome from consanguinity in the second degree mixed with the third, a dispensation in the second equal degree was sent. On the error being discovered and the attention of the Holy See called to it, the S. C. de Sacr. granted a new dispensation. Cf. *Collat. Brug.*, t. XVI, p. 707 s.

2. Gasparri, o. c., n^{os} 324 and 357, insists on this severe discipline of the S. Poenitentiaria. For the rest, the general rule laid down by the S. C. C., 1 May 1907, is applicable : « In the hypothesis of a marriage contracted between relations, outside of the first degree, after a dispensation from the more remote degree only, without obtaining declaratory letters for the nearer degree, the marriage is valid, and it is sufficient afterwards to obtain a declaration as to the nearer degree ». In like manner, the *Adnotationes ad Formulas Datariae Ap.*

it arises, stating which is the nearer sex ; e. g., one will say that the petitioners are related in the first degree mixed with the second, because the male petitioner is the uncle of the female petitioner (1).

To avoid all error in the reckoning of the degrees, the Bishop of Bruges has decided : « If a dispensation is sought for impediments arising from consanguinity or affinity, there must be attached to the supplica *a genealogical tree*, whereon are marked the names of those from whom the petitioners are descended, going back to the common stock » (2). This regulation does not concern the supplica to be sent to the Holy See, but that which is to be addressed by the parish priest to the Ordinary for obtaining an episcopal dispensation or for preparing the supplica to be forwarded to Rome.

5. « **The number** *of impediments*, e. g., if the consanguinity or affinity is twofold or multiplex ; if to the consanguinity is joined affinity or any other impediment, whether diriment or prohibitive ». *number*,

It is, therefore, necessary to state, a/ if the impediment is *multiplied* and how many times, according to the rules of multiplication set forth above for each of the impediments of consanguinity, affinity, spiritual relationship, public decency, and crime (3). The principle is that the omission of this statement would invalidate the dispensation ; but we must remember the restriction made above in the case of affinity, n° 302 (4), and also the decree of the C. S. O., of 22 Feb. 1899, ad 1m, where we are told that the dispensation remains valid, « notwithstanding a material error in the reckoning of the impediments, provided the case has been set forth as it really is », i.e. by furnishing the elements from which is clearly deduced the number of the impediments affecting the petitioners (5). It is also necessary to state, b/

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1. But the custom is, always to begin with the man's degree, whether it is the remoter or the nearer.

2. *Lib. Man.*, p. 188.

3. Cf. *Collat. Brug.*, t. IV, p. 422 s. and the decree of the C. S. O., of 11 March, 1896 ; in the *Collat. Brug.*, t. I, p. 376 s.

4. We have seen that there is no need to mention multiplicity of affinity resulting from intercourse successively illicit and licit with the same person. This is explicitly declared by the present Instruction, on which we are commenting, under 7 ; and the same refers to the answers of the S. Poenitentiaria, of 20 March 1842 and of 10 Dec. 1874.

5. See above, n° 297. For greater security, the Bishop of Bruges has decided that the genealogical tree, of which we have just spoken, shall be sent *complete* to the Official, so that he may see for himself if the impediment is multiplied. The observance of this precaution is strongly recommended, at least in complicated cases. *Lib. Man.*, p. 189 ; cf. above n° 297.

if *several* impediments of different kinds *occur simultaneously*, and what they are, whether diriment or prohibitive, as stated in the text itself. Hence all the impediments, *both prohibitive and diriment*, must, as a condition of validity, be inserted *in the same supplica* and removed simultaneously, the only exceptions being the banns and the vows not reserved to the Holy See, over which the Bishop possesses ordinary power apart from cases of urgency, and from which he can dispense separately in accordance with what has been said in n° 365, A (1).

finally, the various circumstances,

6. « **The various circumstances**, that is to say, whether the marriage is contracted or to be contracted ; if it is already contracted, it must be stated whether it was contracted in good faith, at least on one side, or with knowledge of the impediment (2) ; likewise, if the banns have been published and the form enjoined by the Council of Trent observed ; whether the marriage has been contracted in the hope of obtaining a dispensation more easily (3); finally, whether it has been already consummated, in the case in which it has been contracted in bad faith at least on one side, i. e., with knowledge of the impediment ».

We have seen above, in n° 374,that marriage contracted can be alleged *as a canonical cause*, and even as a very grave one ; we have now to add that, if it is not alleged as a cause, it must still be mentioned *as a mere circumstance*, with all the various particulars just enumerated. We are here speaking of a marriage *contracted* in the sense indicated in n° 359, to the exclusion of a civil marriage celebrated between two persons subject to the law of clandestinity, at least if it is not certain that they intended to contract a

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1. It follows from this that one who cannot dispense from all the impediments, cannot dispense from any of them, saving the exception mentioned. Also, as we have seen in n° 365, A, if, among several impediments occurring together, there is one from which the Bishop cannot dispense, the whole matter must be submitted to the Holy See. We shall point out below, in n° 384, how one is to observe the rule as to the mentioning of all the impediments in the same supplica, when an impediment of the external forum occurs together with an impediment of the internal forum.

2. We have seen, in n° 354, that a dispensation is granted *with greater difficulty* for the revalidation of a marriage contracted in bad faith on both sides.

3. Mention of this intention must not be omitted. The decrees of 1885 and 1901, cited in n° 374, 8, and n° 382, do not concern this point, but remove the obligation of mentioning the intention of obtaining a dispensation more easily in the case of *copula*, but not in that of *marriage*. This is contrary to Feye, o. c., n° 713, and Pompen, p. 55 and p. 141. The *Formulae Datariae Ap.*, 1901, in the *Adnotationes*, declare, on the contrary, that this intention must be mentioned.

real marriage. The celebration, pure and simple, of the civil formalities is not in question here, but, as we have said in n° 374, 13, it can be alleged as a cause ; only, in that case, what we have just said here has no application. Thus, there is no need to add whether the civil union has been contracted in good faith or otherwise, whether with or without the hope of obtaining a dispensation more easily ; moreover this cause must not be alleged without necessity, as we have already said and as we shall say again in 7.

and the causes.

7. It is necessary to allege, in support of the petition, proportionate canonical causes, as indicated above, and to refrain from mentioning occult defamatory causes, and even such as are notorious, if there are sufficient honourable ones for the purpose, according to what we have said in n° 375.

We will show, in n° 403, how far error as to the causes involves nullity of dispensation, but here attention must be paid to the distinction made in connection with n° 375.

382. Points that have to be inserted occasionally.

Observation. 1. *As far as validity is concerned*, other points as to the *religion, age, family* and *position* of the petitioners need not be expressed *on their own account*, but only in relation to the cause alleged ; thus, it may happen that it is necessary to mention the widowhood or age of the female petitioner. But even then, there is no need to be exact as to the number of her years, and it is enough to say that she is *superadulta*, i. e., over twenty-four.

Nevertheless, many of these points, according to circumstances, are *ordinarily* mentioned, or even require to be mentioned *for licitness*. Thus religion must be named, if one of the parties is not a Catholic ; age must be shown for the nearer degrees of consanguinity and affinity, as well as for spiritual relationship beween godfather or godmother and the baptized, and, in the diocese of Bruges, it is generally given in every case ; it is well to add the social position of the family, when the nearer degrees are concerned and especially when smallness of place is alleged ; finally, it is also customary to mention the fact of celibacy or widowhood. With regard to mention of poverty, see the *Scholion* given below, under n° 386.

2. We may here call to mind the admonition given by the S. C. de Sacr., of which we have spoken in n° 362, viz., that the legitimation of children, when necesssary, must be asked for by the petitioners, and mention must be made of the fact in the supplica sent to Rome.

Former discipline with relation to incestuous intercourse.

3. Formerly, before 25 June 1885, it was necessary for validity to insert *on its own account* and *as a simple circumstance*, « *incestuous intercourse* between the parties before the execution of the dispensation, whether before or after the obtaining of the same, whether with the intention of obtaining a dispensation more easily, or without such intention, and whether the intercourse was notorious or occult », whenever there was question « of a forbidden degree of consanguinity, affinity, spiritual or legal relationship, as also when public decency was concerned » (1).

At that time, therefore, a dispensation was null, not only when there was omitted from the supplica the fact of incestuous intercourse already had, or the intention of obtaining a dispensation more easily, but also when, after the granting of the dispensation but before its execution or fulmination, the parties had been guilty of incest, or had repeated it (though their former offence had been mentioned in the supplica) at a time when, in virtue of the Apostolic letters, separation was enjoined (2).

This provision was *abrogated* by the well-known Letter of Leo XIII, of 25 June 1885, which declares and decrees « that *henceforth*. matrimonial dispensations shall be valid, even if the incestuous intercourse or the design and intent of obtaining thereby the dispensation more easily have not been mentioned » (3).

In this connection, it must be observed : a/ that the Decree of 1885, as is clear from the text, applies only to *future* marriages, and accordingly the former discipline must be considered in determining the validity of a marriage anterior to 1885 (4) ; b/ that only the obligation of mentioning the incestuous intercourse *on its own account and as a mere circumstance* is suppressed ; but that there remains the necessity of mentioning it at times for some other reason, such as the *legitimation of the children*, or the *determining of an impediment*, e. g., that of crime arising from adultery with a relation joined with a promise of marriage ; or again when it has to be alleged as a cause.

B. For the internal forum.

383. Points to be inserted in the supplica for the internal forum,

Everything likely to make known the identity of the petitioners must be omitted : their own names, which must be replaced by fictitious names such as Titius and Titia, their position, age and the like. The *diocese* should be mentioned only indirectly and for

1. Instr. of 1877, n° 7.

2. Cf. *Collat. Brug.*, t. V, p. 615 s.

3. The complete text may be found in the *Liber Manualis*, p. 177 s., and in the *Collectan.*, nos 1495 and 1500, where is given the decree of the C. S. O., of 18 March 1891, decreeing the same.

4. *Collat. Brug.*, t. V, p. 615 s.

episcopal dispensations exclusively, so far as is necessary to denote that the Bishop is the proper Ordinary of the petitioners, or at least of the one in whose favour a dispensation is sought ; the name of the parish should also be omitted.

For all that concerns the impediments and the determining of them, the naming of circumstances and of causes, the rules are the same for the internal as for the external forum, but here defaming causes, even occult, may be alleged more readily than in the external forum.

C. When an impediment of the external forum occurs in conjunction with an impediment of the internal forum.

384. or for the external and internal forum at the same time.

Above, in n° 376, we have seen that in this case there must be *two* petitions, *one* for the external forum, in which the public impediment is named and all the particulars necessary for the external forum are inserted ; and *another* for the internal forum, in which mention is made at once of the occult impediment and of the public impediment, signifying that a dispensation has been granted from this latter for the external forum.

This course must be followed in consequence of the discipline of the Church, which, as stated in n° 381, 5, requires that all the impediments should be named at the same time, and removed at the same time. On the one side, the impediment of the internal forum cannot, without injury to the reputation of the parties concerned, be inserted in the supplica for the external forum; and, on the other side, it is not enough that the public impediment should be mentioned in the supplica for the internal forum and removed for that forum at the same time as the occult impediment ; such a dispensation would not be valid for the external forum, which takes cognizance of the public impediment. This is why a dispensation from the public impediment is first sought in the external forum ; such dispensation is secretly null because the occult impediment has not been made known, but is revalidated for the internal forum at the same time that the dispensation (for the internal forum) from the occult impediment is granted, provided the supplica for the internal forum has mentioned the two impediments. In this way both forums are satisfied, as well as the rule requiring that all the impediments should be removed at the same time. Cf. *Collat. Brug.*, t. V, p. 547 s.

How the secrecy of confession and the reputation of the penitent are to be safeguarded in this last case.

Observation. When an impediment of the external forum coincides with an impediment of internal forum, there may still be *danger to the reputation of the party concerned,* notwithstanding the twofold supplica. If recourse is had to the Ordinary for both forums, for the purpose of obtaining an episcopal dispensation, he, on receiving both supplicas almost at the same time, sent from the same place and setting forth the same public impediment, may easily suspect that the occult impediment affects the persons named in the supplica for the external forum. The like may also happen when an Apostolic dispensation is required, if, as is often the case, the task of drawing up the supplica and forwarding it to Rome is entrusted to the Ordinary. Cf. *Collat. Brug.*, t. V, p. 548 s.

Undoubtedly, as concerns the violation of the secret, the difficulty will disappear, if, as a preliminary, the consent of the penitent is obtained, as far as necessary, and all the precautions just indicated are observed. This consent he will give the more readily as his reputation is not here exposed to any certain injury, but merely to suspicion on the part of the Bishop's Official, who is himself bound to secrecy. Nevertheless, circumstances may arise in which it would not be lawful to expose the person concerned even to this mere suspicion, and consequently his consent could not be asked, e. g., if he is a person of high position or personally acquainted with the Official. In such a case, the most practical way is to have *direct recourse* to the S. Poenitentiaria, without the intervention of the Official, or using it only for the transmission of the supplica in a sealed envelope.

This solution of the difficulty supposes that there is time for recourse to the Holy See; but it may happen otherwise, and that the matter can only be put right by recourse to the Ordinary. In this case, recourse should be had to the Bishop rather than to the Official (1). This will be done by applying directly and personally to the Bishop, by a letter marked « private and confidential », in which the reason is stated and the Bishop is asked to be so good as to grant the necessary dispensation personally, and not through the Official (2).

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1. This rule was proposed in the Prosynodal Congregation of Bruges, 11 May 1869.

2. As to this twofold recourse, see what is said above, nº 365, A.

II. The drawing up of the supplica.

1. For an Apostolic Dispensation.

385. How the supplica is to be drawn up when recourse is had to the Holy See,

The *provisional* supplica, to be sent by the parish priest or confessor to the Official for him to draw up the supplica to be sent to Rome, is not subject to any special rules ; it is sufficient that all the required particulars, as stated, should be duly given in it (1).

If the supplica, to be sent to Rome for the internal forum, has to be drawn up by the confessor himself, which sometimes happens (as stated in the preceding n°), it must be sent direct to the Cardinal Grand Penitentiary (Palace of the Chancellery, Rome), not through an intermediate agent, but to the Cardinal Penitentiary himself. Latin, French or Italian may be employed, but it is best to write in Latin, except the address for the reply, which must be clearly written in the vernacular, without any mention of the diocese (2).

The supplica will be drawn up in the name of *one* or of *both* parties, according to the rule given in n° 379.

2. For an Episcopal Dispensation.

or when recourse is had to the Bishop.

The course to be followed is the same as that given in 1, since the Bishop conforms in everything to the rules of the Roman Curia.

Regularly, recourse by telegraph is not allowed.

Observation. *The rule* is that the supplica must be *written* and signed, and *regularly* it is not permissible to apply for a dispensation *by telegram*, as is clear from the letter of the Secretary of State, of 10 Dec. 1891 (*N. R. th.*, t. XXIV, p. 32 s.). The Holy See desires that this rule should be observed by all episcopal curiae. It is influenced herein by the various disadvantages that the employ-

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1. See the specimens given at the end of this volume. A like arrangement for the archdiocese of Freiburg is mentioned in *Archiv f. k. Kirchenr.*, 1912, p. 500.

2. The Secretary of the Propaganda, in a letter to Ordinaries of Missions, 18 March 1896, requests « that letters and documents sent to this Congregation : a/ be written in Latin, or at least in Italian or French ; b/ in legible writing, especially the names of persons and places ; that the paper be of a suitable size, white paper and black ink being employed ; c/ that the order of pages be the same as in printed books ; d/ that the exact amount of postage required by law in different countries be paid by the sender ». *Anal. eccl.*, IV, p. 273. At the present time, under the discipline of the reformed Curia, English, German, Spanish and Portuguese may also be used. Cf. Perathoner, l. c., p. 843, and *Normae Pecul.*, c. VI, n. 5.

ment of the telegraph easily involves. *Exceptionally*, however, application for a dispensation may be made to the Ordinary by telegram, and the Bishop of Bruges expressly permits this, but only when, « owing to want of time, it is absolutely impossible to do so by other means, by post or by a special messenger » (1).

According to the *Instructio* of the S. C. de P. F., 2 Aug. 1901, when the telegraph is employed, it is not permissible to omit mention of the canonical cause, or to suppress « the particulars and circumstances that the Instruction of 9 May 1877 declares absolutely necessary » (2).

However, to avoid undue length and the risk of breaking the seal, it is well to employ the various abbreviations given in the *Liber Manualis*, l. c., especially for use in the diocese of Bruges (3).

On receiving the supplica by telegraph, the Bishop grants the dispensation and informs the sender of the fact in the same way, using similar abbreviations ; afterwards he causes the customary decree of fulmination to be drawn up and forwarded to the parish priest or confessor.

Scholion. Expenses and taxes.

I. For Apostolic Dispensations.

386. Payments to be made when a dispensa-

According to the *Normae Communes*, c. XI, it is determined provisionally, in n° 12, that : « *The taxes that it has been the custom to pay to the*

1. *Lib. Man.*, p. 191. s.
2. *R. th. fr.*, 1902, p. 275, ss.
3. Sic autem scribatur telegramma pro diversitate casuum :

	TELEGRAMMA.
I. Si petenda sit dispensatio super impedimento occulto affinitatis illicitae :	
1. In primo gradu lineae rectae :	Dispensatio A. 1 R.
2. In primo gradu aequali lineae collateralis :	Dispensatio A. 1 C.
3. In primo et secundo gradu mixto lineae collateralis :	Dispensatio A. 1-2 C.
4. In secundo gradu aequali lineae collateralis :	Dispensatio A. 2 C.
Si cum affinitate illicita concurrat publica honestas, addantur litterae P. H. :	Dispensatio A...,P. H.
II. Si petenda dispensatio :	
1. Super impedimento criminis, ex adulterio et fide data tantum :	Dispensatio C. ex A.et F.D.T.
2. Super impedimento publicae honestatis, ex sponsalibus occultis proveniente :	Dispensatio P. H. ex S. O.

Dataria Apostolica and to the S. Poenitentiaria for marriage dispensations shall continue in force for the present ».

tion is sought :

The rule hitherto observed was the following :

A. The S. Poenitentiaria granted and continues to grant dispensations **for the internal forum** without any payment ; hence there is nothing to pay except the *postage*, unless the dispensation is asked for through the diocesan Official's office, when a certain sum must be added for the Roman agency (in the diocese of Bruges, usually five francs).

1. from the Holy See ;

B. For dispensations **in the external forum :**

1. Granted to the *rich* or to the *quasi-poor :* besides the postal and agency payments, a *tax* has to be paid for the support of the officials and for the various expenses connected with the Apostolic Curia (1).

In addition to the tax, the Dataria has been accustomed to exact, by way of fine, a *componenda*, to be devoted to works of piety, when recourse is had to it for a dispensation *sine causa* (2) for the rich, or to obtain in the ordinary form a dispensation from the impediment of consanguinity or licit affinity, whether for an honourable or a defaming cause.

2. For dispensations granted to the *poor*, the S. Poenitentiaria dispensed gratuitously, or with a small tax that just about covered the postal and agency expenses. The S. Congr. de Sacr. seems to follow the same rule ; but when it dispenses gratis, it inserts in the rescript, as stated above, that the Ordinary is to impose an alms to be fixed by him. The Ordinary of Bruges imposes a very small one.

Observations. a) The episcopal curia ordinarily demands a certain sum for the *execution* of the rescript from Rome. This right is explicitly recognised by the *Normae Communes*, c. XI, n° 1 (3).

b) Those are regarded as *poor* who have not a *joint* fortune of about 1600 francs, in Italy, and of about 3000 francs, outside of Italy ; they are said to be *destitute (miserabiles)*, if they live solely by the labour of their hands. Those are reckoned as *quasi-poor*, who do not possess more than about 5000 francs, in Italy, and, out of Italy, not more than about 10000 francs. In estimating the fortune, one must take into account expectations, which are ordinarily reckoned at one half of their value (they must be given at their full value in the provisional supplica drawn up by the parish priest),

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1. The tax paid by the quasi-poor to the S. Poenitentiaria was handed over to the Dataria, after defraying expenses.

2. Cf. above, n° 375.

3. « In every rescript, indult and dispensation, the Office from which it issues will name, not only the tax to be paid to the Holy See and the remuneration due to the agency, but also the amount that the diocesan curia has a right to demand for the execution of the documents, if there is occasion for it ».

and also fixed income derived, for instance, from some office or employ held by one of the parties (1).

c/ In Belgium, by virtue of an indult, the *amount* of the tax or componenda may be equitably fixed *by the Ordinary himself*, who names in the supplica what sum the petitioners are prepared to pay (2).

d/ In accordance with the notice sent to Ordinaries, by order of the S. Poenitentiaria, 5 Feb. 1900, it is required that Bishops should *certify* that the petitioners are poor or quasi-poor, and that they should do so on their own testimony, or, if prevented from doing that, on the testimony of some person specially delegated for the purpose, mention being made of the fact that the Bishop has been so prevented and that the delegation has been given.

Nevertheless, under the new regulations of the Curia, this notice is less applicable, for poverty no longer determines the tribunal to which recourse is to be had ; moreover, as we have observed above, error as to fortune does not affect the validity of the apostolic rescript.

2. *from the Bishop.*

II. For an Episcopal Dispensation.

The Ordinary of Bruges dispenses gratuitously *for the* internal forum, and even, as a rule, *for the external forum* also, the only *exception* made being in the case of *consanguinity and licit affinity* ; for these two impediments he imposes ordinarily on petitioners, who are not poor, a tax proportioned to their means (3).

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1. Such, then, was the way of distinguishing between the poor at the S. Poenitentiaria. The *Formulae Datariae* of 1901, at the end, proposed a different rule, according to which those were considered poor who had not at the time more than 1500 francs, and those as quasi-poor who had not more than 2000 francs. But the S. Poenitentiaria did not think it desirable to adopt this valuation ; hence it was in use only in those countries in which the Dataria itself dispensed the poor and quasi-poor, as in Spain and Portugal. Cf. the replies of the S. Poenitentiaria, of 23 July 1902 and 20 Jan. 1904, in the *R. th. fr.*, 1904, p. 483 s. and 1905, p. 297. Cf. also 1899, p. 408 s.

2. For this it is necessary, according to the *Lib. Man.*, p. 188, that the parish priest « should give a careful estimate of the amount of the present and prospective fortune of the petitioners ».

Cum autem utile sit ut parochi, jam ante dispensationis petitionem, approximative noverint expensas, en quid, attenta praxi Cancellariae Brugensis, circiter solvendum sit occasione dispensationis Apostolicae : 10 nempe franci, a pauperibus, salva levissima eleemosyna de qua supra ; 20 franci vel ultra usque ad 30, a quasi-pauperibus, pro vario statu fortunae ; 35 franci, a divitibus, hac summa adaucta pro crescente fortunae statu, speciatim ubi dispensatur super consanguinitate vel affinitate licita.

3. For the reconciling of this custom, prevailing in episcopal curiae, with the

Chapter V.

CONCESSION AND EXECUTION OF A DISPENSATION.

387. *Scheme.*

Observation. As stated above, n° 346, 4, a dispensation may be granted in gracious form or in commissarial form. In the latter, the dispensation is granted by a twofold act; if we may use the expression, *in actu primo* by the author of the dispensation, and *in actu secundo* by the executor, who applies it to the petitioners. On the other hand, a dispensation simply granted by its author in gracious form is completed by a single act.

In the *first* article, under the title of *Executor of a dispensation*, we shall inquire, for the various kinds of dispensation, *in what form* they are ordinarily granted, and, when the commissarial form is used, *by whom* they are to be executed. In the *second* article we shall explain *the manner* of granting and executing a dispensation.

Article 1. Executor of a dispensation.

I. Apostolic Dispensations :

388. *The execution of apostolic dispensations is usually entrusted,*

These are *regularly* granted in *commissarial form*. Sometimes, however, the Holy See employs the *gracious form*, particularly for revalidation in radice (1); sometimes also the supplica is returned to the Ordinary, with power (which he can subdelegate) of dis-

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various instructions of the Holy See declaring that dispensation is to be given *gratuitously*, cf. De Becker, *De Matr.*, p. 133 s.; Wernz, o. c., n° 634; *N. R.th.*, XVIII, p. 406 s.; the decree of the S. C. C., 10 June 1896, in *Der Katholik*, 1903, II, p. 379 s. The imposition of the tax seems to be in opposition to the gratuity of the dispensation only when it is received for the profit of him who grants or executes the favour, or when it is claimed in return for the favour itself; but the episcopal curia demands it for the expenses of the Chancellery and for the support of good works, and also as compensation for the losses incurred through parties who fail to refund the taxes paid at Rome on their behalf by the Office. Moreover, the rule of gratuitous dispensation, on which the Council of Trent insists, Sess. XXIV, c. V, *De Ref. Matr.*, also affects apostolic dispensations; yet in connection with these we have seen that a tax and a componenda are exacted.

1. Examples of this will be found in the *Collat. Brug.*, t. VI, p. 602; t. XII, p. 119 s. and 765 s.

pensing at his discretion in a particular case (1). This is done, for instance, in case of dispensation from mixed religion and from disparity of worship.

As regards *the execution of a rescript granted in commissarial form :*

for the external forum, to the Ordinary of the petitioners, or of the place ;

A. **For the External Form** : its execution is entrusted *to the Ordinary of the petitioners, or to the Ordinary of the place.*

By « *Ordinary* » are understood those named above, in n° 362. By « Ordinary *of the petitioners or of the place* » is understood he, « who has given letters testimonial, or who has tramsmitted the supplica to the Apostolic See, whether he be the Ordinary of origin or of domicile, whether of both of the parties or of one of them » (2).

If the supplica has been sent by the Ordinary of Bruges, or if it has been supported by his letters testimonial, the task of executing the rescript from Rome is entrusted to the same Ordinary, and consequently the rescript might be executed by the Bishop of Bruges, by his Vicar General or Official, or, if the See were vacant, by the Vicar Capitular ; such Vicar Capitular might execute apostolic dispensations « that had been sent to the Bishop or to his Vicar General and that had not been yet executed, whether the execution of them had been begun or not » (3).

It must be carefully observed, a/ that the Ordinary can execute a dispensation, « even if the parties, at the time when it has to be executed, have left his diocese and gone to settle in another, nevertheless, advising the Ordinary of the place where the marriage is to take place, if he thinks it expedient to do so » (4) ; b/ that the office of executing a dispensation, excepting the verification of the supplica and the examination of the petitioners, is proper and

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1. See above, n° 346.

2. Encyclical of the C. S. O., 20 Feb. 1888 (*Collectan.*, n° 147 s.).

3. Encyclical of the C. S. O., 1888, l. c., where it is added : « In like manner, when the See has been filled, the Bishop or his Vicar General in spiritualibus, or Official, can execute the dispensations sent for execution to the Vicar Capitular, whether he has already begun to execute them or not ».

Note, however, the warning issued by the S. Poenitent., 3 Apr. 1886 (*N.R. th.*, XIX, p. 48 s.) : the new Ordinary cannot take up the execution at the point at which it stands, but « he must start again from the beginning, just as if the Vicar Capitular had done nothing, i. e., as if the business were still untouched ».

4. Encyclical of the C. S. O., 1888, l. c. ; cf. n° 381, 2.

personal to the Ordinary, and that he cannot communicate it to others, as he can the general powers granted him by the Holy See. For if, in taking the necessary informations, he exercises a power of jurisdiction, in dispensing in such a case he exercises only a *merely ministerial power* (1). Consequently he must execute the dispensation himself, apart from the taking of the informations, unless he has a special faculty to designate another person for this purpose. The C. S. O., in the letter cited, has granted this faculty in general, in respect of one other Ordinary, especially in respect of that one in whose diocese the parties are actually living; moreover, the rescript itself may contain the faculty of subdelegating for the execution of such or such a clause, especially for the absolution. This was of frequent occurrence before the reformation of the Curia, and still happens from time to time.

Regularly, the Ordinary entrusts to the parish priest *only* the verification of the supplica; he gives absolution himself, when necessary, even in the case in which he can subdelegate, just as he personally dispenses and legitimates the offspring. It, therefore, only remains for the parish priest, on receiving the decree of fulmination, *to communicate* to the petitioners the absolution and dispensation granted, after having imposed on them the penance and other prescriptions of the Ordinary, in the name of the same.

B. **For the Internal Forum :**

and for the internal forum, to the confessor.

Generally the execution of the dispensation is entrusted *to the proper parish priest of the petitioners* (2) or *to the confessor chosen, or to be chosen, by them from among those approved by the Ordinary of the place*. It makes no difference whether the supplica was sent direct to the S. Poenitentiaria or whether the confessor forwarded it to Rome through the Official; in the latter case the Official receives the rescript, but with instructions to send it on unopened to the confessor.

Ordinarily the confessor is not given the faculty of subdelegating

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1. See above, nº 368, towards the end, and 4, with the places cited; see also the *R. th. fr.*, 1904, p. 721 s.

2. The rescript of dispensation, when it is for the impediment of crime, concerns both the parties, and for this reason the plural is employed. It concerns only one of the parties when it is a question of affinity, and then the singular is used.

another priest for the execution of the dispensation ; nevertheless, as FEYE observes, *De imped.*, n° 748, « authors, with some exceptions, generally teach that the letter transmitted to the competent confessor, but not yet executed, may be withdrawn and given to another, provided that it was not entrusted to any one determinate confessor » (1).

II. Episcopal Dispensations.

389. Episcopal dispensations are for the most part granted in gracious form ;

Dispensations of which the Bishop is the author, in virtue of his delegated or ordinary power, in many dioceses and especially in that of Bruges, are generally granted in *gracious* form, both for the internal and the external forum (2). Accordingly, with the exception of the verification of the supplica, the Ordinary carries out the entire execution himself, even for the internal forum, and does so outside of sacramental confession ; so that here also the office of the parish priest or confessor is confined to *communicating* to the parties the absolution, the dispensation and the legitimation of the children, after having first imposed on them, if required, the injunctions of the Ordinary.This communication may evidently be made, even for the forum of conscience, outside of confession, though the requisite rules must be observed (3).

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1. « Such change is not commendable if made without just cause ; but it is permissible, not only when the priest first chosen is dead, or is hindered by sickness or other cause, or is inexperienced, or too strict, but also generally. even if the first confessor has declared the letter subreptitious or obreptitious ». *Ibidem*, and cf. FERRERES, *La Curia*, n° 873.

2. The Bishop could evidently grant these dispensations *in commissarial form* and delegate a priest to execute them,even such as he grants in virtue of an indult; for we have seen, in n° 368, that even delegated powers,with the restrictions there mentioned, can be subdelegated and exercised by another.This is, moreover, the usual practice in some dioceses, at least for dispensations in the internal forum.

3. If the Bishop dispenses for the *internal* forum in *gracious* rather than in commissarial form, he does so for two reasons : the danger of invalid fulmination is thereby lessened, and greater rapidity of solution is gained in certain cases that may occur. For instance, we will suppose that a parish priest discovers a defaming occult impediment immediately after the celebration of the marriage ; if he has immediate recourse to the Bishop, he will often be able to obtain the dispensation the same day, and not unfrequently he will be able, the same evening, to *communicate* it prudently to the petitioners *outside of confession*, while it would be very difficult for him to *fulminate the dispensation* in their regard *in the act of confession*. Nor is there now reason to fear that the dispensation

III. Sacerdotal Dispensations.

Dispensations which a priest can grant, within the limits laid down in nos 369 and following, both for the external and internal forum, are to be granted and executed by himself.

it is the same with sacerdotal dispensations.

Article 2. Manner of granting and executing a Dispensation.

Paragraph I. APOSTOLIC DISPENSATIONS.

I. For the external forum.

390. Execution of an apostolic dispensation in the external forum :

The following is the course to be followed in executing a rescript from Rome in commissarial form : verify the facts ; fulfil the conditions, if any ; see that the dispensation is accepted ; and finally fulminate it, at the same time legitimating the offspring, if that is needed.

A. Verification of the facts.

1. *Necessity of verification.*

1. regularly, the facts must be verified ;

Regularly, it is necessary, for the validity of the rescript, that, at the time of fulmination, *the alleged facts be true*, especially as regards the nature of the impediment and the existence of the final cause, as we shall explain more fully in chapter VI.

Exceptionally, the truth *of the alleged reason* is not requisite for this validity, when the dispensation is from impediments of the *lower* grade ; this follows from the provision made by the *Normae Peculiares*, c. VII, art. III, no 21 (1), already cited above (nos 375 and 381, 7).

Thus it is necessary that the executor should be certain that the facts are true, as far as that is necessary for validity ; consequently, unless he is otherwise quite satisfied, he must make an *inquiry* into the matter before proceeding to the execution of the dispensation (2).

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granted by the Ordinary is invalid, if the petitioner is not within the diocese at the time of the granting of the dispensation ; as we have seen in no 363, the S. Poenitentiaria has suppressed that clause.

1. This rule, determining that dispensations from minor impediments are not subject to any hazard on the ground of obreption or subreption, must, in our opinion, be restricted to the causes, and does not apply to the declaration of the impediments themselves ; consequently a substantial error on this point would annul the rescript, as seems to be implied by the context.

2. One is not excused from this inquiry by the fact that careful investigations

Undoubtedly this inquiry is not demanded as a condition for the *valid* execution of the rescript, and it is not prescribed by any special regulation (1); nevertheless, it must not be omitted except in urgent cases (2), or unless one is quite certain as to the truth of the facts; indeed, it is better to make it even for those points the existence of which is not of importance strictly for validity, such as the cause alleged in respect of an impediment of the lower grade.

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were made before sending the supplica to the Holy See. As Feye argues, *De Imped.*, nº 738, the facts set forth *in the rescript itself* must be true under pain of nullity, and must be so at the time of fulmination ;« but the information *formerly* taken does not prove that everything is *now* correct; an error may have slipped in; there may have supervened some fresh circumstance that requires mentioning ; new conditions may have been added in the rescript, etc. ». Cf. Planchard, in the *N. R. th.*, XIX, p. 152, where several examples are given.

The first inquiry, being very useful, is in general use and even is often prescribed by diocesan law. Thus, in the diocese of Bruges, the Bishop requires that, in the supplica addressed to him, those who draw it up and forward it should « certify that the alleged causes are true and that beyond the canonical impediments, from which dispensation is sought, there are no others ». This certificate necessarily implies a *previous* inquiry.

1. Before 1885, in the formulas of the Dataria and of the Cancellaria, the execution of the dispensation was entrusted to the executor in the following or like terms : « You will inform yourself carefully of the foregoing, and, *if through the said information*, the petition is found to rest on truth...,you will give the dispensation ». Relying on this text, many authors held that the inquiry should be made regularly for validity. On this controversy, see Feye, *De Imp.*, nº 738 ; Théphany o. c., nº 240 ; Van de Burgt, *Tr. de Disp.*, nos 69-71.

In 1885 the terms were changed : « Inform yourself carefully of the foregoing, and if the facts set forth are true... »; thus the direction to inform oneself remained, but no longer under pain of nullity. Cf. *Collat. Brug.*, t. V, p. 673 ss ; Zitelli, *Dispens.*, p. 87 ; *N. R. th.*, XIX, p. 140 s. and 150 ss.

Finally, under the regulations of the reformed Curia, the new formulas no longer contain the direction to inquire, and only demand the truth of the facts set forth, as was already the usual practice of the S. Poenitentiaria : « if the facts set forth are true » or « if it is so ».

2. If, under urgent necessity, the Ordinary has thought it his duty to fulminate the dispensation, without the other informations having been taken, the parish priest will supply the omission as soon as possible, so as to be sure of the truth of the facts before communicating the dispensation to the petitioners.

The Ordinary might also fulminate it *ex nunc pro tunc*, as they say : i. e., the dispensation would have force only when the inquiry held by the parish priest, as far as possible, had proved that the facts were true.

2. *Method of verifying the facts.*

method of verifying the facts ;

a/ *By common law*, and apart from any special directions, no definite course is prescribed. One may be content with a *summary* and *extra-judicial* examination that enables « the delegated judge to satisfy his conscience as to the truth of the facts ». This is the reply of the S. Poenitentiaria, given 1 July 1859. With it may be compared the rescript of the same tribunal, of 5 Sept. 1899; to the question : « whether it is necessary, in verifying the impediments and causes of a matrimonial dispensation, to interrogate the parties or whether such interrogation is to the omitted, and, in this latter case, whether it is sufficient to question on all the points two trustworthy witnesses », the S. Poenitentiaria replied : « That it depended on the prudent judgment of the Ordinary, regard being had to the particular circumstances of each case, which might make it necessary or desirable to interrogate the parties, as well as the witnesses ». Cf. *R. th. fr.*, 1900, p. 88.

As the executor here exercises not a mere ministerial power, but a jurisdiction delegated by the Supreme Pontiff, he can subdelegate the verification of which we are speaking, even when the rescript does not grant him any special power to do so. Cf. n° 388.

b/ *According to the diocesan law* of Bruges, the Ordinary regularly subdelegates the parish priest to verify the facts, for the external forum, and imposes on him a particular method. He enjoins him to inquire as well as he can, and particularly by interrogating the petitioners and, if he thinks it advantageous, upright and competent witnesses, especially as to the points indicated in a paper attached to the rescript (1) ; he informs him also that he must certify by his signature that the answers to the questions are correct, and that he is to forward them to the Bishop together with the

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1. The following are the questions to be put by the parish priest : 1. Is there any error in the rescript as to the names, forenames, age, domicile or diocese of the petitioners ; — or as to the nature, degree and number of the impediments ? 2. Besides the impediments mentioned in the rescript, are there any others that were not given in the supplica ; and if so, what are they, and were the petitioners in good faith in not mentioning them ? 3. has any fresh impediment supervened since the sending of the supplica ? 4. do the reasons alleged in the petition for obtaining a dispensation, and named in the rescript, really exist ? 5. has the woman been abducted ? 6. has the fortune of the petitioners been correctly valued ?.

Roman document containing the dispensation granted in commissarial form.

B. **Fulfilment of the conditions.**

391.
2. the conditions must be fulfilled,

Under the existing regulations of the Curia: a/ for impediments removed *by the S. C. de Sacr.*, contrary to the former practice of the Dataria and S. Poenitent., no *special* conditions to be observed before fulmination are regularly inserted (1).

After a short introduction rehearsing the supplica and the impediment, the Ordinary is charged to impart the dispensation, *observing the canonical prescriptions* ; if there is any further direction, it concerns the imposition of an *alms*, when the dispensation is given gratis. *Exceptionally*, for certain impediments, and in particular for that of crime, there are imposed special conditions preliminary to fulmination, especially the *penance* and the *cessation of the scandal*. The formulas of the S. C. de Sacr., mentioning these clauses, are said to be drawn up *in special form* ; the others, bearing no special condition or only such as concerns the alms, are said to be *in common form* (2).

1. Moreover, the rescript recites the causes in a determinate or indeterminate manner, according as there is question of a major or minor impediment. See above, nº 375.

2. The following is a translation of the *new* formula of the S. C. de Sacr., *in forma communi* :

Most Holy Father,

N. N..., of the diocese of N..., and N.N..., of the same diocese, desiring to contract marriage, humbly ask of Your Holiness a dispensation from the impediment by which they are bound (consanguinity in the second degree of the collateral line), which opposes their legitimate union.

The Sacred Congregation of the discipline of the Sacrements, in virtue of the faculties granted it by Our Most Holy Lord Pope Pius X, considering the cause especially put forward for the obtaining of the desired favour, which is (excessive familiarity)... and having regard to the matters set forth, charges the Ordinary of the woman, that, if the matters set forth be true, observing the canonical prescriptions, in his benevolence he impart to the petitioners dispensation from the said impediment, that so they may be able to contract marriage as they desire, all things to the contrary notwithstanding, (an alms being given by them to be fixed as to its amount and to be applied in accordance with the judgment of the said Ordinary).

Given at Rome at the house of the said Congregation, on the... day of December 1908.

The following is a specimen of the *new* formula of the same S. C., *in forma speciali :*

Most Holy Father,

N. N. and N. N..., of the diocese of N..., humbly make known to Your Holi-

b/ For the impediments from which the Holy Office dispenses, i. e., for mixed religion and disparity of worship, dispensation is granted only under the ordinary conditions, indicated in n° 254 and 291 ; for the impediment of vow, which appertains to the S. C. *de religiosis*, the necessity of *absolving* from censures and penalties is pointed out.

We are of opinion that account is to be taken only of the conditions expressly mentioned, and not of those which it was formerly the custom to insert and which are now omitted. We interpret the general condition as to the *observance of the canonical rules*, as concerning, not the conditions and prescriptions that had formerly to be observed *before fulmination*, but *merely the act of fulmination*, that is to say, the fulmination must be made in writing, and with mention of the Apostolic authority, concerning which see below, n° 393, where we shall also speak of absolution ad effectum. Whether, and to what extent, the conditions, whether expressly inserted in the text, or required to be observed by general rule in the act of fulmination, are necessary for validity, we shall point out when treating of them individually (1).

We accordingly proceed to speak of the conditions in particular :

1. *The alms.*

in particular : the alms,

The alms is fixed by the Ordinary. In the diocese of Bruges it is generally very small, and at the end of the list of questions, of which mention has been made above, is stated the amount that

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ness, that they are prevented from marrying by an impediment that they have contracted (through a mutual promise of future marriage made during a marriage by which one of them was then bound). Grieving that they have contracted the impediment, they earnestly ask of Your Holiness that they may be freed from it.

The Sacred Congregation of the discipline of the Sacraments, in virtue of the faculties granted it by Our Most Holy Lord Pope Pius X, considering the cause especially put forward for the obtaining of the desired favour, which is (the removing of scandal),... charges the Ordinary, that, having imposed on the petitioners a salutary penance, provided that no scandal arise and the matters set forth be true, he impart to the same dispensation from the said impediment, observing the canonical prescriptions, all things to the contrary notwithstanding, (an alms being given by them to be fixed as to its amount and to be applied in accordance with the judgment of the Ordinary).

1. For the general rules for deciding the necessity, as regards validity, of observing the conditions of the rescript of dispensation (or of the indult), see . Wernz o. c., n° 640 ; Zitelli, *De Dispens.*, p. 75 ; Gennari-Boudinhon, *Consultations-Morale*, Cons. CXXV ; Gasparri, o. c., n°364.

each of the petitioners is to give to the poor ; but the fulfilment of this clause is by no means necessary for validity.

the juridical penance,

2. *The juridical penance* (1) is also generally left to the judgment of the Ordinary, but it is necessary to observe the degree named in the rescript, according to the directions given there to impose a *salutary*, or a *grave*, or a *grave and prolonged* penance (2).

According to the notice issued by the S. Poenitentiaria, 8 Apr. 1890, the executor « in determining the quality, gravity, duration etc. of the penance, must not be either too severe or too indulgent, and he must take into account the condition, age, weakness, employment, sex etc. of those upon whom he is enjoined to impose it ».

The Ordinary of Bruges generally imposes for a *salutary* penance the daily recitation, for *fifteen days*, of five Paters and five Aves ; for a *grave* penance, the daily recitation, for *one month*, of three Paters and three Aves and the acts of Faith, Hope, Charity and Contrition ; for a *grave and prolonged* penance, the same prayers for *two months* ; when there is added a clause enjoining monthly confession during a time to be determined by him who gives the dispensation, he fixes *four* months as the period for this (3).

3. *The juridical absolution.*

the juridical absolution,

This absolution from censures, which must not be confounded with the absolution ad effectum, of which we shall speak later, removes the censures for which it is granted *absolutely* and *radi-*

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1. This penance is called *juridical* to distinguish it from *sacramental* penance ; the latter is imposed to make satisfaction *to God*, the former to repair the wrong committed *against the Church*.

2. On the discipline in force before the reform of the Curia, and on the doubts concerning the necessity of the penance for the validity of the rescripts, see *Collat. Brug.*, t. VI, p. 40, p. 382 s. and p. 554 ; IX, p. 725 ; Feye, o. c., n° 743, 744 and 752 ; Zitelli, *De Dispens.*, p. 81 ; Planchard, in the *N. R. th.*, XIX, p. 623, and in *Dispenses*, n° 490, 218, 257 ; *Monitore eccles.*, 1901, p. 11 s. ; *R. th. fr.*, 1901, p. 341.

It may be said that the validity of the dispensation is not endangered in the case in which the petitioners have not accepted the penance, or have done so only with the intention of not fulfilling it, nor even, probably, at least for dispensations of the external forum, in the case in which the penance has not been *imposed*, though inserted in the text, the more so, as the reformed Curia shows a marked tendency to mitigate the formalities that were formerly strictly required.

3. The rules laid down in the *Liber Manualis*, p. 103, and in the *Collat. Brug.*, t. VI, p. 41, must be modified in this sense.

cally (1). In the rescripts of the S. C. de Religiosis, concerning the impediment of vow, it is stated that the absolution can be given *through a subdelegated person.* The formula will be found below in n° 393.

4. *The cessation of scandal.*

the cessation of scandal,

Formerly, that is to say before 1885 (2), in rescripts for defaming causes, it was customary to insert the following condition : « *(The executor) will cause the scandal to cease, especially by imposing separation during such time as he shall judge desirable, if that can be done* ».

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1. Formerly, before the reform of the Curia, the absolution was generally enjoined at the same time as the juridical penance, when the cause or impediment alleged involved a delinquency. This was an absolution from *the fault* or from *the fault and censure,* according as the sin committed was considered as exempt from or subject to censure ; it concerned both the external and the internal forum.

The absolution from *the fault* did not take away the sin, in so far as sin is an offence against God, but being given, as here, for the external forum, it caused the fault to be no longer, *in the eyes of the Church,* a reason for proceeding against the offender and for punishing him. When given *for the internal forum alone,* it brings it about that, if he is punished by the Church on account of the delinquency existing in the external forum, he is no longer bound before God and in conscience to pay the penalties imposed, except in so far as the preservation of public order demands it.

Absolution *from the censure and the fault, moreover* removes radically, and not merely ad effectum, the censures and penalties already enacted by the Church, and that may have been incurred by the offender. It removes them before the external forum (and consequently before both forums) or before the internal forum alone, according as it is given for the external forum or for the internal forum. We have an example of a delinquency subject to censure in *the breaking of a vow* taken in religion ; it is the same with *incest,* for if, since the Constitution *Apostolicae Sedis,* this crime no longer incurs excommunication by the common law, it is nevertheless presumed that ecclesiastical penalties have been enacted against it by the particular law. In the case of *adultery,* it is presumed that there may have been incurred the anathema of the Council of Trent against those who say « that it is lawful for Christians to have several wives and that this is forbidden by no law ». In like manner, those who contract marriage *before an heretical minister as such* are presumed, on account of the adhesion to heresy implicitly contained in that act, to have incurred the excommunication specially pronounced by the Constit. *Apostolicae Sedis,* « in haereticos eorumque credentes ».

2. The discipline anterior to 1885 is explained in the *Collat. Brug.*, t. V. p. 679 s.

At the present time this clause is of less frequent occurrence, and when it is inserted, e. g., in the case of crime, it is simply said: « provided that there be no scandal ». This condition is regarded as fulfilled, not only when there is no scandal at all, but also when it has been removed before execution. It does not seem to be required for validity.

The *means* of removing the scandal is left to the judgment of the Ordinary who executes the rescript. The best way is the separation of the parties *a toro et cohabitatione*, or, if that cannot be effected conveniently, a declaration made by the parties before the parish priest and two witnesses, that they are sorry for the offences committed and ask pardon for them as well as for the scandal that they have given (1).

Note. When in the rescript, on account of defamatory causes, a penance or cessation of the scandal is imposed, the Official of Bruges, in addition to the list of questions for the verification of the facts, sends to the parish priest a separate paper with the rescript, in which he imposes the penance and the reparation of the scandal in his own name. At the same time he charges the parish priest to make inquiry as to the acceptance of this penance, the giving of the alms (2), the existence of scandal, the carrying out of the separation consequent on the order given (3), or of other measures ordained for the removal of the scandal (4).

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1. There is a controversy as to the observance of this clause. Some require it for validity, others only for liceity, as we have shown in the *Collat. Brug.*, t. V, p. 683, quoting the authors favouring each opinion. The supporters of the wider view have on their side the already mentioned tendency of the Curia, since its reform, to make the formalities easier.

2. It is a question here of the alms imposed as a penance, distinct from that of which we have spoken in 1.

3. When the Ordinary has enjoined separation according to the text of the paper we are about to give, the parish priest must communicate this injunction to the parties concerned, even if they are living apart, and they must remain separated, during the prescribed time, *because of the order given in the name of the Ordinary*, and the parish priest must certify their compliance. Cf. *Collat. Brug.*, t. V, p. 682 s. with the notes given there.

4. The following is the text of this paper:

Ego infrascriptus Vicarius Generalis Officialis Revmi Dni G.-J. Waffelaert, Episcopi Brugensis oratoribus.... juxta praescriptiones canonicos injungo:

I. Ut, si adsit scandalum et separatio fieri possit,

separati vivant a thoro et cohabitatione. Quae quidem separatio, juxta responsum S. Poenitentiariae, de die 4 Februarii 1884, *injungenda est*, etiamsi constet oratores separatos habitare et usque ad diem matrimonii habitaturos.

and other particular injunctions;

5. The particular clauses, imposed for dispensations from *mixed religion* and from *disparity of worship*, are always in force. They are inserted in the new formulas, including that which forbids the parties to present themselves before a non-catholic minister, whether before or after the celebration of the marriage before the parish priest, and the Ordinary is admonished that *he must be morally certain that these conditions will be fulfilled* (1).

This is why the Ordinary then sends two papers, containing the promises to be obtained from each of the two parties respectively (2). The parish priest must obtain their signatures to these

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II. Ut singuli oratores, pro poenitentia....

III. Ut singuli oratores eleemosynam.... erogent pauperibus.

Velit igitur R. D. Pastor indicare :	RESPONSA.
1. An oratores poenitentiam acceptaverint ?	1.
2. Quatenus adsit scandalum :	2.
A. *Si fieri possit separatio :*	A.
a) An oratoribus *separatio* MEO NOMINE *injuncta* fuerit ?	*a*)
b) An oratores, VI INJUNCTIONIS MEÆ, per tempus praescriptum, *revera* separati fuerint ?	*b*)
B. *Si fieri nequeat separatio,* an *aliter* et quomodo scandali reparationi provisum fuerit ?	B.
3. An oratores praescriptam eleemosynam erogaverint aut erogare promiserint.	3.

Brugis.... Responsa suprascripta vera esse testor.
N. N.

1. As to the validity of a dispensation given without the required cautions and precautions, see n° 291.

2. The following is the twofold form to be signed by the parties, in the diocese of Bruges, when one of them is a non-catholic :

a/ Je soussigné..., domicilié à..., m'engage,par les présentes, à laisser baptiser et élever dans la religion catholique, apostolique et romaine, tous les enfants de l'un et de l'autre sexe, qui naîtront de mon futur mariage avec...., domiciliée à..., et à leur laisser, à eux et à ma future épouse, liberté pleine et entière de remplir tous les devoirs de la religion catholique. Je m'engage en outre à ne me présenter, pour mon mariage, que devant le curé catholique *seul*, et partant à ne recourir pour les mêmes fins, soit avant soit après, au ministre d'aucun autre culte.

En foi de quoi, j'ai signé le présent acte de ma propre main.

Fait en double à...., le....

b/ Je soussignée..., domiciliée à..., m'engage, par les présentes, à laisser baptiser et élever dans la religion catholique, apostolique et romaine, tous les enfants de l'un et de l'autre sexe, qui naîtront de mon futur mariage avec...., domicilié

papers; he must then give one copy to the contracting parties, which they will preserve carefully as a remembrance of the obligations they have taken upon themselves, and send the other to the episcopal curia, together with his attestation, as a guarantee of the future fulfilment of these promises (1).

C. Acceptance of the dispensation.

392.
3. the acceptance of the dispensation must be secured;

According to the *more probable* opinion, the *acceptance of* the dispensation is required for its *validity* (2), unless the Church foregoes it, as in the case of revalidation in radice.

The acceptance by the party subject to the impediment is, however, sufficient, provided it is absolute; or by *one* of the parties, if it is a question of a relative impediment or one common to both of them (3); nevertheless, when it can be done conveniently, acceptance by both the contracting parties must be obtained. Even *implicit* acceptance suffices, and this exists when the interested party knows that the dispensation has been granted, or asked for, or even that it is going to be asked for, and raises no objection.

à.... Je m'engage en outre à user de toute mon influence auprès de mon futur époux, pour l'amener, surtout par la prière et le bon exemple, à reconnaître la vérité de la foi catholique. Je m'engage enfin à ne me présenter, pour mon mariage, que devant le curé catholique *seul*, et partant à ne recourir pour les mêmes fins, soit avant soit après, au ministre d'aucun autre culte.

En foi de quoi, j'ai signé le présent acte de ma propre main.

Fait en double à...., le...

1. Should it happen that the Ordinary, at a time when there is urgent necessity to dispense, has not as yet received the written document with its attestation, he can dispense *ex nunc pro tunc* in accordance with what has been said under nº 390, in the note.

2. Sanchez, o. c., l. VIII, Disp. XXVI, nº 6; cf. l. III, Disp. XXXVII, and the authors there cited; Salmant., o. c., *De Matr.*, c. XIV, nº 38; S. Alph., o. c., l. VIII, nº 1145; Giovine, o. c., I, cons. 90, p. 147; Caillaud, o. c., nºs 111, 219 and 381; Van de Burgt, *De Disp.*, nºs 86 s.; Théphany, o. c., nº 442 s.; Feye, *De Imp.*, nº 760; Pompen, o.c., nº 96; Gasparri, o.c., nºs 398 and 414; Wernz, o. c., nº 641; Leitner, *Lehrb.*, p. 454 s.; Planchard, *Dispenses*, nº 309; Ojetti, *Synopsis*, nº 1824. Cf. the *Causa Baltimoren.*, of 30 June 1910, in the *A. A. S.*, 1910, p. 590 s., and the *Causa Divionen.*, of 20 Jan. 1911, in the *A. A. S.*, III, p. 284 ss. Cf. nº 65, in note.

3. This opinion seems safe in practice, provided at least that the other party makes no formal opposition to the dispensation. It is maintained by Sanchez, l. c.; the Salmant., l. c.; Giovine, l. c.; Théphany, l. c. and Planchard, l. c., against De Justis, o. c., l. I, c. III, nº 58.

Thus there is generally no need to be anxious about this acceptance, for ordinarily it is in the knowledge of both parties, or at least of one of them, that a dispensation has been, or will be, asked for in the external forum. It may, however, at times be thought advisable to withhold this knowledge until the dispensation has been actually obtained or even already executed in the external forum, as will appear from what we shall have to say in the second Section ; in this case, care must be taken that the dispensation is *communicated* to the parties concerned before the marriage, and is thereby implicitly accepted (1).

D. Fulmination.

393.
4. it must be fulminated.

The Ordinary, after having received information as to the truth of the facts and the observance of the conditions, especially as to the giving of the alms, the imposition and acceptance of the penance and the cessation of the scandal, thereupon dispenses in due form and expressly from the impediment in question, carefully determining its nature and mentioning the mandate received from Rome, together with the date of the rescript (2).

If the power of legitimating has been inserted in the Roman document, observing the like formalities, he also declares the offspring legitimate (3).

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1. Particular attention must be paid to this communication, as will be stated later, in the case of dispensations of the internal forum granted by the Bishop in gracious form, without the knowledge of the parties.

2. Dilectis Nobis in Christo... salutem in Domino.

Ob causas sanctæ Sedi Apostolicæ expositas, in examine veritate niti repertas, tamquam delegatus apostolicus, vi specialis facultatis a SS. DD. die... Nobis concessæ, vos a quibusvis sententiis, censuris pœnisque.... ecclesiasticis, si quibus quomodolibet innodati sitis, ad effectum hujus dispensationis consequendæ dumtaxat, absolventes et absolutos fore censentes, vobiscum dispensamus super impediment... in ordine ut... impediment... et constitutionibus, ordinationibus apostolicis, cæterisque contrariis quibuscumque non obstantibus, matrimonium in facie Ecclesiæ, ad normam decreti *Ne Temere*, a S. C. C. editi die 2 Augusti 1907, valide contrahere ac solemnizare et in eo postmodum libere et licite remanere possitis, dummodo tamen illud, præter express...., non obstet impedimentum canonicum et mulier rapta non fuerit.

Datum Brugis, sub signo nostro, die... mensis... anni 1910.

1. *Spurious* children cannot be legitimated by subsequent marriage, the authority of the Pope is, therefore, necessary for their legitimation. The Ordinary, to whom is entrusted the execution of an Apostolic dispensation, cannot in this case

In this connection it is well to *observe :*

1. That the execution or fulmination of the dispensation must be made *in writing*, giving the names and fore-names of the petitioners, since, in the external forum, the granting of the dispensation must be capable of proof, and otherwise the observance of the necessary formalities would be rendered more difficult (1). What precedes the actual act of fulmination, i. e., the carrying out of the conditions, may be done *orally*, though it is better that it should be done in writing ; if it is done *orally*, mention must then be made of the fact in the deed of fulmination. Even when these conditions are imposed and executed *in writing*, which is preferable, it is generally done by a deed distinct from the document of fulmination, mention being made in this latter document of the execution as far as already effected ; this, as we have observed in n° 391, is the case with the penance and the cessation of the scandal, while the juridical absolution is granted rather in the very act of fulmination (2).

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issue the decree of legitimation in the name of the Holy See, unless he has received a special faculty to do so, either in the text of the rescript, or in some other indult, as we have already observed more than once, particularly in n° 362. The S. Poenitentiaria declared the same in its reply of 21 Apr. 1908, as also the S. C. de Sacr., 29 Jan. 1909 (*Collat. Brug.*, t. XIV, p. 97 ss. and p. 172).

Formerly, before the reform of the Curia, the Holy See was accustomed to insert this faculty of legitimation, even when it was not asked for and was frequently superfluous, as we have remarked in the *Collat. Brug.*, t. VI, p. 123 ; whenever carnal intercourse or even a suspicion of unlawful relations was alleged in the supplica, the charge of legitimating the offspring was entrusted to the Ordinary ; very frequently, children were legitimated by Papal decree, when they had no need of it, since they were about to be legitimated by the subsequent marriage, e. g., when they had been conceived before the execution of the dispensation, but would be born only after. Cf. above, n° 166. Under the new regulations, the faculty of legitimating seems no longer to be inserted in the rescripts of the external forum, unless expressly asked for in the supplica ; and it must only be asked for when it is foreseen that there will be need of it, i. e., when the children are already born or will be born before the fulmination of the dispensation.

1. The *written* document is not necessary for the *validity* of fulmination, as stated in n° 365 ; therefore, fulmination may be made orally or by telegram, not only validly, but also licitly in case of necessity. In that event, a deed certifying the fact must be drawn up afterwards, so as to furnish proof of it in the external forum. See above, n°s 385 and 393.

2. The following is the formula employed by the Ordinary of Bruges for

2. It may be asked if, under the new regulations of the Curia, it is still necessary to give *the absolution from censures ad effectum*, in the act of fulmination (1).

This is no longer necessary *for validity*, except when the censure has been inflicted by name. The *Normae Peculiares*, c. III, art. I, n° 6, determine that « favours and dispensations of every kind granted by the Holy See are valid and legitimate, even for those under censure, except for such as are excommunicated by name or suspended a divinis by the Holy See ». But this absolution, nevertheless, remains necessary *for licitness*, as, for licitness, it must precede the sacramental absolution from sin (2).

In the new formulas of the S. C. de Sacr. there is certainly no longer special mention of absolution ad effectum, which the Holy See itself hitherto granted in the rescripts of the Dataria and of the S. Poenitentiaria for the external forum (3). But it appears to be implicitly contained in the general formula regarding the canonical rules to be observed in fulmination (see the beginning of n° 391), that is to say, the absolution ad effectum is considered as a prescription in relation to the very act of fulmination. There is accordingly no occasion to mention it specially, as hitherto no

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fulminating a rescript from Rome, with defaming causes, and for absolving juridically at the same time :

Nos, de mandato...., vos a sententiis, censuris et pœnis ecclesiasticis, si quibus quomodolibet innodati fueritis, ad effectum infrascriptæ gratiæ dumtaxat consequendæ (hucusque absolutio ad effectum), ab incestus (quatenus intercesserit) et aliorum excessuum in supplica allegatorum reatibus, necnon a censuris et pœnis ecclesiasticis inde forsan incursis, in utroque foro absolvimus (hìc absolutio juridica).

1. Absolution from censures *ad effectum*, as the name implies, does not remove them *absolutely and radically*, like the juridical absolution, but only *in part ;* it simply causes the censure to be no longer an obstacle to the valid and licit obtaining of a dispensation, but leaves it otherwise unaffected. It is also called *general* absolution *ad cautelam*. Cf. *Collat. Brug.*, t. VI, p. 32 ; see the formula employed by the Ordinary of Bruges, given in the preceding note.

2. In this the *Studiën*, p. 245, are in agreement with us. Ferreres, *La Curia*, nos 235-237, seems to be of a different opinion.

3. An explanation of the former discipline will be found in the *Collat. Brug.*, t. VI, p. 32-35 ; cf. also t. XII, p. 537 s., where is given the text of the rescript formerly in use.

mention of it was made in the rescripts of the Holy Office and S. Poenitentiaria for the internal forum, though it was the custom for the executor to give it.

Until more precise instructions are received, it is, therefore, with good reason that the practice of absolving ad effectum is preserved in most of the offices of Officials in these parts, when the dispensation is fulminated in virtue of a rescript of the S. C. de Sacr. Cf. also the formula of fulmination, just given in a note.

3. The decree of the C. S. O., of 14 Aug. 1892 (*Collectan.*, n° 2194), confirmed by the answer of the S. Poenitentiaria, of 15 Jan. 1894 (*N. R. th.*, XXVI, p. 406 s.), declares a matrimonial dispensation invalid, « if the Ordinary fulminates it after having had knowledge of it by telegram and before the receipt of the authentic document stating that the favour has been granted,... unless the telegram has been sent officially, by order of the Holy See ».

4. According to an answer of the S. Poenitentiaria, of 27 June 1885, quoted in Feye, *De Imp.*, n° 756, should it happen « that, before the execution of the Apostolic dispensation, the petitioners, in favour of whom it has been sent, contract marriage in error according to the form of the Council of Trent », the Ordinary, on hearing of the matter, may « still validly execute the dispensation ; the parties having to present themselves afresh before the parish priest and the witnesses and to renew their consent ».

5. If the executor, in dispensing from the impediment, has omitted to declare legitimate the children already born, this can be subsequently supplied, not only by himself, but also by his successor in office (1).

6. The document from Rome, with the evidence of fulmination, is preserved in the episcopal archives ; the parish priest must also preserve the deed of fulmination, and mention in the marriage register that a dispensation has been obtained, unless it is

1. The reason of this is, according to Pyrrhus Corradus, *Praxis Dispens.*, l. VII, c. II, n° 27, that the duty entrusted to the executor is twofold : he has to dispense and to legitimate ; nothing prevents him from doing the one without the other. Further, the executor can legitimate the children, even when the dispensation from the impediment can no longer be executed, e. g., owing to the death of one of the petitioners ; nevertheless, the decree of legitimation will not hold good, if the petitioners *voluntarily* give up their projected marriage, as the author states, *ibidem*, n° 33.

a matter of a defaming impediment, which must not be made public in any way.

II. For the internal forum.

394. *For the execution of a dispensation from Rome in the internal forum:*

The course to be followed in the execution of a dispensation from Rome is substantially the same for the internal as for the external forum.

The *confessor*, on whom the choice of the penitent imposes the duty of execution, after having received the sealed rescript, whether directly from the S. Poenitentiaria, or through the agency of the Official's office, will proceed to the verification of the facts, to the execution of the clauses, and to the fulmination of the dispensation, having previously obtained the petitioner's acceptance of the dispensation.

It is advisable to do all this *in confession*, and even the fulmination of the dispensation ought to be made in confession. The penitent, must therefore be induced to come to confession, either by telling him to do so in a previous confession, or by inviting him to come after the receipt of the rescript, in this case, first obtaining of him permission to speak of a matter concerning sacramental secrecy. Thus it is here again necessary :

A. **To verify the facts.**

1. it is necessary to verify the facts;

The confessor must especially inquire into the existence of the impediment, as set forth in the supplica and in the rescript from Rome, then into the cause and the other conditions imposed by the S. Poenitentiaria, according to the text of the decree, to which he will give attention ; he will inform himself in particular of the occult character of the impediment, of the necessity of contracting marriage for the purpose of avoiding dangers or scandals, and so forth. He must then question his penitent carefully, after serious warning of the grave obligation he is under of speaking the truth, and of the disastrous consequences that would result from want of sincerity ; but he may take the penitent's statement as true, unless he knows from other sources that it is not so.

B. **To fulfil the conditions.**

2. to fulfil the conditions,

The actual rescripts of the S. Poenitentiaria still contain, under the same form, the same clauses as before the reform of the Curia, as may be seen by comparing the respective specimens, one of

which is given in the *Collat. Brug.*, t. XII, p. 552, and the other, quite recent, in the note below (1). The following are the principal conditions :

in particular, as to confession,

1. *Sacramental confession must be heard.*

The words of the text are : « *after having heard his (or their) sacramental confession* ». Therefore, it is necessary (for validity),

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1. Seraphinus, divina miseratione Episcopus Portuensis et Rufinæ, S. R. E. Cardinalis Vannutelli, SS. DD. Nostri Papæ et S. Sedis Apostolicæ Major Pœnitentiarius.

Dilecto in Xo proprio latorum parocho, sive confessario ex approbatis ab Ordinario loci, per eos specialiter electo, salutem in Dno. Ex parte viri et mulieris latorum præsentium Nobis oblata petitio continebat, quod ipsi aliàs vivente alio (a) latricis (oris) conjuge, se carnaliter cognoverunt, fidemque invicem sibi dederunt de matrimonio inter se contrahendo si dictæ latricis (latoris) conjux præmoreretur, quo (qua) defuncto (a), neutro eorum in ejus mortem machinante, de dicto matrimonio contrahendo tractarunt. Cum autem, sicut eadem petitio subjungebat, impedimentum criminis ex præmissis proveniens occultum remaneat, et ipsi justis et gravibus de causis ad hujusmodi matrimonium contrahendum urgeantur, ideo ad consulendum rebus suis et pro suæ conscientiæ quiete cupiunt a præmissis, de quibus plurimum dolent, per Sedem Apostolicam absolvi, secumque desuper dispensari ; quare supplicarunt humiliter, ut sibi super his de opportuno remedio providere dignaremur. Nos igitur qui apostolicæ Pœnitentiariæ curam gerimus hujusmodi supplicationibus inclinati, Auctoritate apostolica Nobis concessa, Discretioni tuæ committimus, quatenus dictos latores, audita prius eorum sacramentali confessione, a quibusvis censuris et pœnis ecclesiasticis, si quas propter præmissa quomodolibet incurrerint quibusque actu innodati existant, adulterio cum fide data, et excessibus hujusmodi hac vice in forma Ecclesiæ consueta absolvas : injuncta eis pro modo culpæ gravi pœnitentia salutari, et aliis quæ de jure fuerint injungenda. Demum, dummodo impedimentum criminis ex præmissis proveniens occultum remaneat, et nisi matrimonium inter latores contrahatur periculum immineat, vel scandalorum vel perseverantiæ in peccato aliquam occasionem, quæ judicio tuo nequeat ab ipsis sine magna difficultate aut gravi damno removeri, cum iisdem latoribus, quod, præmissis non obstantibus, dummodo aliud ipsis non obstet canonicum impedimentum, matrimonium inter se publice, ad normam Decreti « Ne temere », die 2 Aug. 1907 editi, contrahere et in eo postmodum remanere licite valeant, pari apostolica Auctoritate misericorditer dispenses : prolem suscipiendam, non tamen in adulterio conceptam, exinde legitimam nunciando. In foro conscientiæ, et in sacramentali confessione tantum, et non aliter, neque ullo alio modo ; ita quod hujusmodi absolutio et dispensatio in foro judiciario nullatenus eis suffragetur. Nullis super his datis litteris, sed præsentibus sub pœna excommunicationis latæ sententiæ statim per Te post executionem penitus laceratis. Datum Romæ apud S. Petrum sub sigillo Officii Pœnitentiariæ, anno Domini....

and it is sufficient, that there should be *sacramental* confession, i. e., confession made with a view to sacramental absolution (1) ; but it is not necessary that such absolution should be given, and thus the fulmination is valid when the absolution is null or when it has to be deferred because the penitent is not properly disposed ; but in this latter case it is better, if there is nothing to prevent it, to defer the fulmination also (2).

The confessor chosen, in virtue of the Papal authority, can hear this confession *anywhere,* when the rescript is entrusted indiscriminately to the confessor chosen, or to be chosen ; but if it is entrusted to the confessor chosen from among the priests approved by the *Ordinary of the place,* the confession cannot be heard outside of the diocese of the Bishop who has approved the priest in question.

2. *Removal of the occasion of sin.*

removal of occasion of sin,

This clause is ordinarily imposed for a dispensation from *illicit affinity*. For the fulfilment of this condition, it is sufficient, if the occasion is a necessary one, to render it remote. Observe that « the confessor can fulminate the dispensation, if the penitent promises to avoid the occasion with sincerity sufficient for considering him properly disposed to receive sacramental absolution » (3).

3. *Penance to be imposed.*

the juridical penance,

This is the *juridical* penance, distinct from the sacramental penance. According to the nature of the impediment and the gravity of the fault, it must be salutary, grave, or grave and prolonged. It is left to the confessor to fix this penance ; but he

1. Confession, without any view to absolution, is not sacramental confession, and does not fulfil the condition imposed.

2. This is stated in the reply of the S. Poenitentiaria, quoted by ZITELLI, o. c., p. 87 : « Provided the confessor who executes the rescript of the S. Poenitentaria observes what is prescribed for him in the document, the dispensations given in virtue of the rescript will be valid, even should it happen that the penitent confesses and receives absolution from his sins in a way that is null and sacrilegious. If the confessor sees that the penitent is not properly disposed and cannot be absolved, he must endeavour to dispose him rightly, or if that cannot be done at the time, he must defer, together with the absolution from sin, the above-mentioned dispensations, unless there is some urgent necessity for expediting them ».

3. POMPEN, o, c., n° 87. The observance of this clause is not necessary for validity.

will conform to the rule followed by the Ordinary. See above, n° 391, 2.

4. *Juridical absolution.*

the juridical absolution;

Juridical absolution must be given from the offence, or the offence and the censure, according to the text of the rescript, observing what has been said above, in n° 391, 3.

The S. Poenitentiaria appears to have kept here for the internal forum the style of the Curia that it was accustomed to employ before the reform, as stated in the same place.

C. **To cause the dispensation to be accepted.**

396.

3. to see that the dispensation is accepted;

It is sufficient to call to mind what has been said in n° 392. The dispensation cannot be fulminated unless it has been previously accepted, at least implicitly. For the rest, as it is here a question of a dispensation granted in commissarial form, and so to be executed in the presence of the petitioner, there is little need to be anxious about this acceptance; it is practically impossible to execute the dispensation without the petitioner knowing of it and, consequently, accepting it implicitly. Observe that acceptance by *one* party *alone* suffices, even when the impediment is relative, and so common to both.

D. **To fulminate.**

397.

4. to fulminate it.

When the confessor has ascertained the truth of the facts set forth in the rescript and in the supplica, and has seen to the acceptance of the juridical penance and to the removal of the occasion of sin, he may proceed in all security to fulmination.

For this, after giving the absolution ad effectum, and the juridical absolution from the offence, or from the offence and censure, he will declare, *by word of mouth*, that he dispenses from the impediment in the name and by the authority of the Pope; he will then legitimate the children, if the rescript contains directions to do so; finally he will give sacramental absolution from sins, if there is no obstacle, and impose the sacramental penance.

The *form* of absolution is the same as that which, in the Ritual, precedes the sacramental absolution: *Dominus noster Jesus Christus...*, mention of the particular offence committed being inserted. This absolution is at once *ad effectum* for all censures indiscriminately, and absolute for those in respect of which the rescript

grants a special faculty. To this is added immediately the decree of fulmination, as well as that of legitimation, if there is occasion for it, in the following manner :

Dominus noster Jesus Christus te absolvat et ego auctoritate Ipsius te absolvo ab omni vinculo excommunicationis et interdicti, signanter ab excessibus admissis, necnon a pœnis et censuris quas ob præmissa forsan incurristi, in quantum possum et tu indiges.

Insuper, auctoritate Apostolica mihi specialiter delegata, dispenso tecum super impedimento affinitatis illicitæ in 1° gradu æquali lineæ collateralis, ex eo proveniente quod cum sorore sponsæ copulam habueris (1), ut eo non obstante cum muliere quam ducere intendis, matrimonium publice, in forma Decreti *Ne Temere*, contrahere, consummare et in eo permanere valeas. Eadem auctoritate prolem (susceptam et) suscipiendam exinde legitimam fore nuntio et declaro. In nomine P. et F. et Sp. S. Amen (2).

Finally, to the formula of dispensation and of legitimation succeeds the sacramental absolution from sins : « Deinde ego te absolvo a peccatis tuis in nomine Patris et Filii et Spiritus Sancti. — Passio Domini nostri Jesu Christi... » (3).

Special observations as to the impediment of crime ;

Observations. 1. When a dispensation has to be given from affinity, the dispensation is to be executed only in respect of the guilty party (4). On the other hand, dispensation from the impedi-

1. Si agitur de adulterio, dicatur : « super impedimento criminis, ex adulterio fide data provenientis », et ita porro.

2. This is the form to be employed following the style of the Curia ; it is not, however, necessary to observe it strictly under pain of nullity, as has been said in n° 365, but it suffices, for the validity of the fulmination, that the nature of the impediment be suitably determined, and that the dispensation be given, mentioning the authority in virtue of which one acts.

3. Though many authors like Feye, *De Imp.*, n° 757 ; Gasparri, o. c., n° 401 ; Theol. Mechl., o. c., n° 100, qu. 4, ad I ; Pompen, o. c., n° 109, declare that sacramental absolution ought to precede fulmination of the dispensation, it would rather seem that we ought to adhere to the answer of the S. Poenit., 19 May 1834, given by Zitelli, o. c., p. 88. The question was put : « Ought dispensations from occult impediments, in the case of marriage already contracted, to be declared immediately after absolution, or before the preparations for absolution have been made, and before absolution is given ? ». The answer was : « The dispensations in question must be declared *before absolution*, and the confessor can concede them, even if he thinks it right to defer the absolution from sins ».

4. Cf. *Collat. Brug.*, t. VI, p. 680 s. This is true even when the other party has knowledge of the fault committed by the prospective partner. Thus we could quote a case in which a dispensation was asked in the names of the guilty and

ment of *crime*, when both parties are guilty (1), must be executed in respect of *both*, according to the reply of the S. Poenitentiaria, of 15 Nov. 1748, and this must be done even when each of the parties has a different confessor. In that case « the first confessor, after having imparted the dispensation to one of the parties in conformity with the terms of the rescript, must give the letter of the S. Poenitentiaria (sealed) to his penitent ; he will give it to the other party, who will have it executed for him by a different confessor, who, when the business in completed, should at once destroy the letter. Although ordinarily an impediment is of such a nature that when it is removed for the one it is thereby removed for the other also, the purpose of the S. Poenitentiaria is that the rescript should be executed for both parties, if not for the removal of the impediment, at least for imposing on both the fitting salutary penances, which it is not right to exact from one alone, when the offence is common to both » (2).

2. We are reminded in the text of the rescript, « that such absolution and dispensation are without value in the judicial forum » ; this clearly follows from what has gone before.

3. An injunction is given that the rescript, after execution, be *burnt or torn up*, at the latest within three days, under pain of excommunication latae sententiae (incurred by the very fact). There is, however, no reason why a copy of the rescript should not be preserved, without the date or any mark that could serve to indentify the penitent in whose favour it was obtained (3).

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non-guilty parties at once, because the latter had knowledge of the matter, but the rescript was granted in favour of the guilty party alone. See also above, n° 379.

1. Such is adultery with promise of marriage, or complicated with murder of partner, with contrivance on the part of one and the other.

2. But as it is sufficient for validity to execute the dispensation in respect of one party, should it happen that it cannot, without very grave difficulties be fulminated a second time for the other party, e. g., because he cannot be induced to make his confession, one can refrain from doing so and proceed just the same to the celebration of the marriage. Cf. Feye, *De Imp.*, n° 758.

3. In the *Lintzer Quartalschrift*, 1905, p. 582, is cited a rescript of the S. Poenitent., of 29 Feb. 1904, giving the following answer to an inquiry as to how long it is lawful to keep the letters of dispensation, when the penitent, in respect of whom it has to be executed, does not put in an appearance ; and whether, after the letters have been burnt the dispensation can still be executed, when the party

398. *and dispensation from the vow of chastity.*

Scholion. It frequently happens that the confessor has to have recourse to the S. Poenitentiaria to obtain a dispensation *from a simple vow of chastity;* early knowledge of this impediment is more readily obtained than of other impediments of the internal forum, and so there is more frequently time for recourse to the Holy See. We are speaking of a perfect vow of chastity, for otherwise the Bishop can dispense from it, and of an occult vow not taken in a religious congregation, for, in the alternative, it would be necessary to obtain a dispensation in the external forum.

In this matter it is necessary to give special attention to certain points, as will appear from the text of the rescript given in the note (1). In the first place, the confessor ordinarily receives

concerned presents himself: « The faculty remains even after the destruction of the letters, but the letters may be kept as long as there is any probability that the penitent will appear, care being taken to avoid the danger of losing them ».

1. « Dilecto in Christo proprio Latricis (Latoris) parocho, sive confessario ex approbatis ab Ordinario loci, per eam specialiter electo, salutem in Domino. Ex parte Latricis nobis oblata petitio continebat, quod ipsa alias simpliciter et private vovit castitatem servare ; cum autem, sicut eadem petitio subjungebat, dicta Latrix continenter vivere posse diffidat, ideo, pro suæ conscientiæ quiete, cupit sibi votum præfatum, ad effectum licite matrimonium contrahendi, per Sedem Apostolicam commutari : quare humiliter supplicavit, ut sibi super his de opportuno remedio providere dignaremur ; nos igitur, qui Apostolicæ Penitentiariæ curam gerimus, hujusmodi supplicationibus inclinati, auctoritate Apostolica nobis concessa, discretioni tuæ committimus, quatenus, si est ita, dictam Latricem, audita prius ejus sacramentali confessione, a mutatione hujus propositi, si tibi sic expedire videatur, absolvas hac vice in forma Ecclesiæ consueta, cum pœnitentia salutari ; ipsique votum præfatum, ad hoc tantum ut matrimonium, servatis alias de jure servandis, contrahere, et in eo debitum conjugale exigere et reddere licite valeat, in sacramentalem confessionem semel quolibet mense, et in aliqua pœnitentiæ opera, per te injungenda, tamdiu duratura quamdiu commutationi præfatæ locus erit, inter quæ sint etiam aliqua pietatis, quæ quotidie faciat ad eum finem ut ea adimplens meminisse semper possit obligationis, qua hujusmodi voto adstringebatur, prout secundum Deum ipsius animæ saluti expedire judicaveris, pari Apostolica auctoritate, dispensando commutes ; in foro conscientiæ, et in ipso actu sacramentalis confessionis tantum, et non aliter, neque ullo alio modo ; ita tamen ut si conjugi, cui matrimonio jungetur, supervivat, castitatem servet, utpote eodem voto, ut prius, obligata, et, si extra licitum matrimonii usum (quod absit) contra VI Decalogi præceptum delinquat, aut mortuo conjuge, alteri absque nova dispensatione matrimonio jungatur, sciat se contra votum hujusmodi facere, et debitum conjugale exigere non posse absque nova commutatione : et ita illam moneas ». Cf. *Collat. Brug.*, t. III, p. 583 ss., ubi proponitur rescripti interpretatio.

delegation *to grant a dispensation by commutation* rather than a simple dispensation (1), and the favour is accorded, as a general rule, only *with a view to marriage* (2), for, if there is no marriage, all reason for dispensing disappears, seeing that the obligation of observing chastity already exists on other grounds and the vow in question only sanctifies it ; of its nature, it is much more an aid than an obstacle to virtue. Thus the favour concerns only marriage, and only a *present* marriage ; moreover, the party bound by the vow is obliged, *by the virtue of Religion*, to observe chastity apart from the lawful use of the present marriage.

In granting the dispensation by commutation, the confessor must prescribe, according to the text of the rescript, monthly confession, the recitation once a month of the fifteen decades of the Rosary and assistance at Mass on a week-day ; also, the daily recitation of a « Hail Mary » in the morning, on rising, and at night, on retiring to rest, in order that the person concerned, « in performing these acts, may always be mindful of the obligation imposed upon him by his vow ».

Paragraph II. EPISCOPAL DISPENSATIONS.

399. Method of dispensing employed by the Ordinary;

As we have already observed, it is preferable that the Ordinary should dispense in *gracious* form, both in the internal and in the external forum ; this is always done by the Ordinary of Bruges. This is the way in which he proceeds : he does not ordinarily impose, even for the external forum, a fresh preliminary inquiry ; but, apart from special circumstances, endorses the statement made by the parish priest as to the truth of the facts contained in the supplica. He then dispenses from the impediment by a single act, in writing. This document first makes mention of the Apostolic authority and gives the text of the indult (when the Ordinary dis-

1. Nevertheless, a recent rescript, of 22 June 1911, was given by the S. C. de Relig. to the Ordinary of Bruges, « *to dispense* from the simple vow of chastity as set forth by the petitioner in the supplica ». The petitioner had formerly made his profession with simple vows in the Congregation of the Little Brothers of Mary (in California) ; he had been freed previously from his vows of poverty and obedience.

2. Sometimes, however, a dispensation may be given otherwise than with a view to matrimony for instance, in favour of one who is subject to constant scruples precisely on account of the vow.

penses by delegated power) ; then follows the absolution ad effectum, and, if required, the juridical absolution with the penance ; various conditions are then imposed, and finally the dispensation is given, with the legitimation of the offspring, where necessary (1). For

1. We give, as a specimen, the *formula fulminationis* employed by the Ordinary of Bruges :

A. *For the external forum*, for consangninity, affinity, or public decency, in virtue of an indult, for honourable causes :

Vicarius-Generalis Officialis Illustrissimi ac Reverendissimi Domini Gustavi-Josephi Waffelaert, Episcopi Brugensis.

Dilectis Nobis in Christo N. N., Diœcesis Brugensis, salutem in Domino.

Cum SS. D. N. Pius, divina providentia, Papa X, die... Nobis, inter alias facultates, benigne etiam concesserit, ad quinquennium, facultatem :

« 1° Dispensandi in 3 et 4 simplici, et mixto, in contrahendis et in contractis ; « cum hæreticis vero conversis, etiam in 2 simplici, et mixto, dummodo non « attingat primum gradum, et, in his casibus, prolem susceptam declarandi legi- « timam. 2° Dispensandi super impedimento publicæ honestatis, justis ex spon- « salibus proveniente. 3° Dispensandi super impedimento criminis, neutro tamen « conjugum machinante, ac restituendi jus petendi debitum amissum. 4° Dispen- « sandi in impedimento cognationis spiritualis, præterquam inter levantem et « levatum, baptizantem et baptizatum ».

Tanquam Sedis Apostolicæ delegatus, vi hujus facultatis... vos a quibusvis sententiis, censuris et pœnis ecclesiasticis, ad effectum præsentis gratiæ dumtaxat consequendæ, absolventes et absolutos fore censentes, ob causas animum nostrum moventes et dummodo vera sint exposita, vobiscum dispensamus super impediment... ut matrimonium inter vos in facie Ecclesiæ, ad normam decreti *Ne Temere*, a S. C. Concilii editi die 2 Augusti 1907, licite et valide contrahere possitis : dummodo tamen aliud non obstet impedimentum canonicum, mulier rapta aut, si rapta fuerit, in potestate raptoris non existat. Prolem sive susceptam sive suscipiendam exinde legitimam declaramus...

Datum Brugis, die...

When the Ordinary of Bruges dispenses for the external forum *by reason of defaming causes*, and he deems it good to impose corresponding conditions, specially penance, he inserts these conditions by means of a separate sheet, of which the text is as follows :

Vicarius-Generalis Officialis Illustrissimi ac Reverendissimi Domini Gustavi-Josephi Waffelaert, Episcopi Brugensis.

Oratoribus, quibuscum, vi hisce adnexi instrumenti, dispensamus, nomine nostro injungatur ut singuli eleemosynam... pauperibus erogent ; pro salutari poenitentia... et, si adsit scandalum, hoc reparent modo judicio parochi determinando, ac maxime, si forte cohabitent, per separationem saltem triduo duraturam, quoad fieri potest. Brugis... 191....

When a dispensation is required from public *crime*, he further adds to the act of dispensation a separate sheet, in which are inserted the defaming conditions :

the internal forum he acts in the same way, likewise making use of a written form. Further, the Ordinary of Bruges observes the form proper to the external or internal forum, as the case requires,

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Reverende Domine Pastor,

Oratoribus, quibus adjuncta dispensatio conceditur, pro gravi pœnitentia salutari injungimus ut singuli per quatuor hebdomadas, quotidie recitent ter *Pater* et *Ave*, ac semel Actus Fidei, Spei, Charitatis et Contritionis : atque insuper per quatuor menses, confessionem sacramentalem semel in mense instituant.

Sciant præterea se ad reparandum grave scandalum ab ipsis datum teneri ; modus autem illius reparationis sit v. g. veniam a Deo petere coram parocho et duobus testibus ; vel alius judicio parochi determinandus.

Præsentibus comburendis.

Veneranter signo,
N. N.

B. *For the internal forum*, for the occult impediment of crime, in relation to marriage to be contracted :

Vicarius-Generalis Officialis Illustrissimi ac Reverendissimi Domini Gustavi-Josephi Waffelaert, Episcopi Brugensis.

Vi facultatis a S. Sede die.. ad quinquennium Nobis concessæ, sequentis tenoris : « Dispensandi super occulto impedimento criminis, dummodo sit absque ulla « machinatione, etiam in matrimoniis contrahendis, in casibus tamen urgentiori- « bus, in quibus tempus non suppetat recurrendi ad S. Sedem ; injuncta... gravi « pœnitentia salutari et confessione sacramentali semel singulis mensibus, per « tempus dispensantis arbitrio statuendum » : tamquam delegatus apostolicus, tenore præsentium (re confecta, statim dilacerandarum), Titium et Bertham, subditos diœcesis Brugensis, acceptata pœnitentia infra descripta a sententiis censuris et pœnis ecclesiasticis si quibus quomodolibet sint innodati ad effectum hujus gratiæ consequendæ tantum, necnon a quibusvis reatibus ac censuris aut pœnis ob causas in precibus allatas aut alias forsan contractis absolventes et absolutos fore censentes, cum eisdem dispensamus super impedimento occulto criminis, siquidem sit absque ulla machinatione nec tempus suppetat recurrendi ad S. Sedem, ut matrimonium valide et licite coram facie Ecclesiæ, ad normam decreti *Ne Temere* a S. C. C. editi die 2 Augusti 1907, inter se contrahere valeant, dummodo tamen nullum aliud obstet canonicum impedimentum, mulier rapta non sit, aut, si rapta sit, sub potestate raptoris non existat. Prolem susceptam sive suscipiendam exinde, non tamen in adulterio conceptam, legitimam decernimus ac respective nuntiamus.

Pro gravi autem pœnitentia salutari injungimus ut uterque, per quatuor hebdomadas, quotidie recitent ter *Pater* et *Ave*, ac semel Actus Fidei, Spei, Charitatis et Contritionis ; statuimus insuper ut, per quatuor menses, confessionem sacramentalem semel in mense instituant.

particularly as to the insertion or omission of the names and Christian names of the petitioners.

When he has to dispense at the same time from an impediment of the external and of the internal forum, he dispenses from the former in the form proper to the external forum, and from the latter according to the form proper to the internal forum, at the same time revalidating for the forum of conscience the dispensation invalidly granted for the external forum (1).

duty of the parish priest,

The *parish priest*, on receiving a dispensation in gracious form *for the external forum*, must *communicate* it to the petitioners, imposing, *in the name of the Ordinary*, the penance named in the document together with any other conditions mentioned therein.

When the business is finished, he will preserve the document carefully in the archives, and will note in the register of marriages that the dispensation was obtained, as stated in n° 393.

and of the confessor.

The *confessor*, on receiving a dispensation *for the internal forum*, will *communicate* it in like manner to the guilty party directly concerned, imposing on him the required injunctions and in particular the penance, if there be one, *in the name of the Ordinary*. Observe that this communication is here necessary for validity, when the dispensation has been asked and granted without the knowledge of the parties.

However, it may be made *out of confession*, but if the impediment is known only through confession, the confessor must first obtain the permission of the penitent. When the communication has been made, the letter of dispensation must be torn up or burnt immediately.

Dispensation by telegram.

Observation. As we have said, the Ordinary *regularly* dispenses *in writing* ; nevertheless, he may do so *by telegram*, when the case is very urgent and no other means are available. In this case, after sending the telegram, he forwards to the parish priest or confessor the decree of fulmination drawn up in the regular way. For the telegram he employs various abbreviations, given in the *Liber Manualis*, p. 193, corresponding to the abbreviations to be

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1. The extent to which the Bishop has to observe herein the style of the Curia is explained in n° 365 ; cf. also n^{os} 393 and 397 ; the same must be said, while taking into account what has been said in n° 370, of sacerdotal dispensations, of which we shall speak in n° 400.

employed in applying for the dispensation, as indicated above, in n° 385 (1).

Paragraph III. SACERDOTAL DISPENSATIONS.

400. Rule to be followed by the priest in dispensing,

In accordance with what we have said in n^os^ 369 s., every priest may find himself called upon to dispense. In particular, parish priests and confessors of the diocese of Bruges receive very extensive delegated faculties for the internal and external forum, and for both forums at once. When the occasion for dispensing arises :

for the internal forum,

1. *In the internal forum,* if it is a case, for instance, *of occult illicit affinity* or *of occult crime,* the priest will act in the confessional as pointed out above, in n^os^ 393-397 ; he will remove the impediment *by word of mouth,* and will employ, according to the circumstances, the different forms there given (2).

for the external forum,

2. *In the external forum* for a *public* impediment binding a *dying person,* he will dispense *in writing,* unless time is absolutely wanting for that (3), in which case he will draw up the document afterwards, so as to afford proof, in the external forum, of the removal of the impediment ; for the rest, he will proceed according to the rules laid down in n° 399 relative to dispensations granted, in virtue of an indult, by the Ordinary in the external forum, not omitting the clauses and precautions mentioned in n° 358. Joder gives the form to be employed, o. c., p. 142 s. (4).

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1. Conceditur nempe dispensatio super affinitate sub clausula *pœnitentiæ salutaris,* quod significabitur per litteras *Cum P. S. ;* super crimine, sub clausula *gravis* pœnitentiæ salutaris et confessionis, quod indicabitur, in responso telegraphico, per litteras *Cum P. g. et C.* Pro determinatione autem utriusque pœnitentiæ, necnon confessionis frequentiæ, applica normam propositam ad n. 391, sub 2° ; pœnitentia et confessio sunt intimandæ oratori vel oratoribus *nomine Ordinarii.*

2. When the priest dispenses in virtue of the Bishop's *ordinary* power, he will say : « Insuper auctoritate ab Episcopo mihi specialiter delegata, dispenso... » ; otherwise he will say : « Auctoritate Apostolica mihi subdelegata... ».

3. See above, n^os^ 365, 370, 393 and 399.

4. N. N. parochus ecclesiæ N.. diœcesis N.

Universis præsentes litteras inspecturis Salutem.

Notum facimus quod Joannes N. et Anna N., parochiani mei, a sex annis civiliter copulati, consanguinei in secundo æquali gradu collaterali, ob gravissimum Joannis mortis periculum, ex quo non suppetit tempus recurrendi ad Reverendissimum Ordinarium, ad consulendum conscientiæ, prolemque legitimandam de

3. If an impediment *of the external forum* occurs in conjunction with an impediment *of the internal forum*, which may happen in the case of the dying, he will dispense from the public impediment in the way pointed out in 2., and from the occult impediment as directed in 1., revalidating for the forum of conscience the dispensation granted in the external forum. *and for both forums at once.*

401. Practical observations on marriage in extremis.

Scholion. When there is question of celebrating *marriage in extremis*, whether without a dispensation or with an episcopal or sacerdotal dispensation, the provisions *of the civil law* must be taken into account. Where the law of anteriority of civil marriage is in force, in dealing with dying persons who have not been civilly married one must see, as a preliminary, that they comply with the civil formalities given in nos 46 and 83.

If there is danger in delay, one can hasten on the civil marriage by obtaining from the *Procureur du Roi* a dispensation from the public notices and from the delay required by law. See above, no 46.

This dispensation must be sought by means of a petition addressed to the *Procureur du Roi*, drawn up and signed by the two parties interested, or by one of them, or by some third person, such as the parish priest or confessor (1). By law, application must be made *par requête sur timbre*, but in practice it may be made *par requête sur papier libre*.

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opportunæ dispensationis gratia Nos deprecati sunt, ad effectum contrahendi inter se matrimonium ;

Constito Nobis scandalum sufficienter fuisse reparatum ex eo quod partes coram testibus pessimam suam agendi rationem detestaverint ; Nos illorum commodo et saluti misericorditer in Domino providere volentes, vigore facultatis extraordinariæ Nobis per decretum Rmi D. D. Episcopi, de die.... pro casibus urgentioribus, in quibus recursus ad ipsum Episcopum sit impossibilis, subdelegatæ, prædictos oratores, ad effectum præsentis gratiæ consequendum, imprimis absolvimus ab omnibus sententiis, pœnis censurisque ecclesiasticis, speciatim ab iis quas ob præmissa incurrerunt, injuncta moribundo obligatione recitandi una vice actum contritionis, mulierem vero condemnantes ut quotidie per annum actum contritionis recitare teneatur.

Dein cum eisdem et auctoritate prælaudata, ut non obstante impedimento de quo supra, necnon constitutionibus ordinationibusque Apostolicis cæterisque contrariis quibuscumque, modò aliud non obstet impedimentum, matrimonium inter se publice, servata forma Decreti *Ne Temere*, contrahere, illudque in facie Ecclesiæ solemnizare et in eo postmodum libere ac licite remanere possint ac valeant, dispensavimus, sicut tenore præsentium dispensamus, prolem susceptam et suscipiendam legitimam fore nuntiantes.

Datum in.. die.. mensis.. anni..

1. The following is a specimen of a petition sent by a priest on behalf of the interested parties ;

The petition must be accompanied by a *medical certificate* showing that one of the parties is in danger of death, but, in a case of urgent necessity, the testimony of some person worthy of credence, such as that of the parish priest making the application, may take the place of this.

The letters of dispensation must be presented to the civil officer, who, on receipt of the same (to be afterwards attached to the marriage document), *may* proceed to the formalities of the civil marriage, though he is not thereby bound to do so (1).

In these cases, the civil marriage can take place *at the house* of the contracting parties, as is always lawful when one of the parties is incapable of going to the *maison communale* (2).

Finally, if the case is so urgent that absolutely there is no time to secure even a hurried civil marriage, or if this is impossible on account of some impediment of the civil law that does not admit of dispensation, there must be no hesitation about proceeding to the religious marriage, whenever the salvation of the dying person demands it. In order to avoid the legal penalties, the priest may then dispense from the impediment of clandestinity, and assist at the marriage without witnesses, as stated above, in n° 369.

A Monsieur le Procureur du Roi à..

Le soussigné X (nom, prénom, profession, domicile du curé ou du confesseur), a l'honneur de vous exposer que le nommé A (nom, prénom, âge, lieu de naissance, domicile et résidence, qualité de majeur ou de mineur, filiation du futur époux) se propose de contracter mariage avec la nommée B (mêmes indications que pour le futur mari), devant l'officier de l'état civil de.. ; que les publications et l'affichage, prescrits par les art. 1 et 2 de la loi du 26 Décembre 1891, n'ont pas été faits ; que d'autre part A (ou B) est en danger de mort ainsi qu'il conste du certificat médical ci-joint, et qu'il y a lieu de craindre que, s'il fallait procéder aux formalités requises par les articles précités, le marriage projeté ne pourrait être célébré ;

que A et B ont vécu maritalement jusqu'à ce jour et ont le plus grand intérêt à se marier en vue de régulariser leur union, et (ajouter s'il y a lieu) de légitimer un enfant (ou plusieurs) qui leur est né ;

Pour ces motifs le soussigné Vous prie, Monsieur le Procureur du Roi, aux termes de l'article 7 de la loi du 26 Décembre 1891, de les dispenser de toute publication et de tout délai. — Date et signature.

1. As may be seen from the form of dispensation, the civil officer receives from the *Procureur du Roi* not an order but a permission, and can accordingly refuse his assistance, but he must then give his reasons.

2. Cf. *Collat. Brug.*, t. I, p. 102 s., VII, p. 132 s. ; ROLAND ET WOUTERS, o. c., especially nos 684, 687, 773 and 775 ; it is there stated, *inter alia*, that, when the marriage takes place at the house of the parties, care must be taken that it is performed *publicly*, i. e., with open doors. This publicity is a formality requisite for validity, subject to the restrictions set forth in n° 83.

Very recently, however, a law has been passed in Belgium, by which the penalty does not apply to a priest who has admitted a dying person to religious marriage, before the civil marriage has taken place, when « tout retard apporté à la bénédiction nuptiale eût pu avoir pour effet de rendre le mariage religieux impossible ». Cf. above, n° 230.

A commentary on this law will be found in the *Collat. Brug.*, t. XV, p. 99 ss. Among the points that we have developed there, it must be noticed, that *the only condition*, necessary and sufficient, for avoiding the penalties of art. 267 of the Code Pénal, is that the danger of death of one of the parties is so imminent as to afford good reason to fear that there is not time to comply with the civil formalities, taking into account the fact that they can only be carried out after obtaining a dispensation from the public notices and from the delay required by law, and that, in certain circumstances, authentic evidence of the death of a former partner must be produced, or that the consent of the parents must be obtained. Moreover, there is no other formality to be observed or condition to be fulfilled, for instance, it is not necessary that, before the religious marriage, there should be the doctor's testimony that the danger of death is imminent ; nor is there any need, afterwards, to advise the *Procureur du Roi* or the civil officer that the religious marriage has been celebrated ; finally, if the dying person survives and is unexpectedly restored to health, he is under no obligation to go through the civil form of marriage (1).

Chapter VI.

DEFECTS IN A DISPENSATION AND HOW THEY ARE REMEDIED.

Paragraph I. DEFECTS.

Preliminary observation. A matrimonial dispensation may be vitiated in various ways ; either on account of *him who grants it*, if he has not the requisite power (2) ; or on account of *him who*

1. See Knoch, *Rev. eccl. de Liège*, 1910, p. 293 ss. ; Standaert, *Collat. Gandav.*, p. 67 ss.

2. Here arises the question of the *cessation* of a rescript *through the death of him who granted it*. Rescripts in *gracious* form, being *gratiae factae*, do not lapse by the death of the author. As to rescripts *in commissarial form*, or *for a particular case :*

Apostolic rescripts do not lapse at the death of the Pope, if they have been granted by the SS. Congregations in virtue of their *ordinary* powers, since these powers continue to exist, as we have seen in nos 351 and 368. If they have been

has to execute it, if, for instance, he dies before executing it (1); or on account of *him who obtains it*, if he is incapable of it, or does not accept it (2), or if he intimates to the Author of the dispensation his renunciation of it (3); or on account of *its execution*, if the formalities required for validity have beeen omitted (see nos 390 and following); or, finally, on account *of the rescript*, granting the dispensation in gracious or in commissarial form.

403. In the rescript,

We have to treat particularly of the defect that invalidates the dispensation **by reason of the rescript**, directing our attention solely to what may vitiate it *fundamentally* (4); moreover, under the new regulations of the Curia, it would seem that absence of the

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granted *in virtue of a special delegation of the Pope*, they remain valid, when the business has been begun; and if the business has not been begun, they are still considered as continuing to exist when they were granted *in commissarial form*, but not when only the faculty of dispensing in a particular case was granted, because in the former case, not in the latter, the executor alone is the *executor necessarius* and *has* to apply the dispensation. We have explained the principles applied here in the *Collat. Brug.*, t. VII, p. 264 ss.; cf. nos 368 and 65.

Episcopal rescripts, when in commissarial form, do not lapse *by the death of the Bishop*, if they are given in virtue of a power *delegated* by the Holy See, for this power, being granted to the Ordinary, does not come to an end at the death of the Bishop; those that are granted in virtue of the *ordinary* power continue to exist when the business has been begun, or even if the business has not been begun, when the executor *has* to apply the dispensation, as we have just said.

Formerly, to want of power on the part of the author was attributed *error as to the means* of the petitioners, for instance, when the rich were represented as poor or quasi-poor, and obtained from the S. Poenitentiaria a dispensation for which only the Dataria was competent. But at the present time, recourse is the same for rich and poor, and so error or fraud as to fortune no longer invalidates the dispensation, as we have observed in the note at the end of no 351 and in no 386.

1. Rescripts lapse *through the death of the executor* only when he has been chosen *ex industria personae*; but apostolic rescripts are generally granted only to an executor chosen *on account of his office*, as the confessor, to be fixed on by the penitent, or the Ordinary; as to the Ordinary himself, the diocese is never left without one through death.

2. See above, no 392.

3. A dispensation does not lapse merely through non-use of it, and consequently if one, who has a dispensation from consanguinity still unfulminated, does not marry his kinswoman but some other person, on the death of the latter, he is able to marry the former without a fresh dispensation. Cf. Pompen, o. c., no 96, and Feye, *De Imp.*, no 732.

4. As to defects in the *extrinsic* form, cf. *Collat. Brug.*, XIII, p. 95.

purely exterior formalities to be observed in the drawing up of the rescripts of the Holy See does not impair their validity (1).

A rescript of dispensation may be vitiated fundamentally by an error in the facts stated, or in the stating of them ; false statements may be inserted, or points requiring expression omitted. These errors have relation either to the reasons assigned, or to the determining of the impediment, or to the circumstances, etc., which are required to be inserted either by law or for the observance of the style of the Curia, in accordance with the information given in n° 381. The error may be due to him who presents the supplica, or to him who draws up or transcribes the rescript (2) ; it may also be the result of an accidental change, e. g., the supervening of a fresh impediment, or the disappearance of the reason assigned. If false statements have been inserted in the document, there is said to be *obreption* ; if points requiring expression have been omitted, there is said to be *subreption*.

To determine when an error of this kind vitiates a matrimonial dispensation, we must take into consideration the nature of the error, i. e., the error in itself, and the time at which it occurred.

I. With regard to **the error in itself** :

an error arising from the bad faith of the interested parties invalidates the dispensation,

A. *If the error is due* **to bad faith,** i. e., if, in the supplica, a false statement is knowingly made or the truth out of malice suppressed, the dispensation *is always viliated,* even when the error affects only matters of minor importance, provided, of course, that it bears on a point affecting the dispensation (3). Thus, if a non-existing cause is fraudulently alleged, the dispensation is null, even though the cause in question be merely impulsive.

The proof of our statement is easy. In c. 20, X, I, 3, Pope Innocent X ordains that those who, by fraud or malice, « allege what is

1. The *Normae Peculiares,* c. III, n° 4, state that rescripts in commissarial form must be executed by the Ordinary, « except in one or the other of the two following cases : if the supplica is manifestly vitiated, i. e., *marked by obreption or subreption,* or if the dispensed person seems so unworthy that the granting of the dispensation would cause scandal to others ». *Collat. Brug.,* t. XIV, p. 295.

2. An error due to the carelessness of the secretary also vitiates the rescript. Cf. *Collat. Brug.,* t. X, p. 69 s.

3. Cf. *Collat. Brug.,* t. X, p. 566 s.

false or suppress what is true, shall, in punishment of their perverse conduct, derive no advantage from the dispensation » (1) ; the maxims of the law are to the same effect : « fraus et dolus alicui patrocinari non debent » (fraud and trickery should profit no one), « mendax precator carere debet penitus impetratis » (a lying petitioner must be deprived of what he has obtained).

B. *If the error is committed* **in good faith** :

as also an error committed in good faith, if it is substantial.

1. A dispensation is *invalid* when the error is *substantial*, i. e., when it bears on the impediment itself, or on a necessary circumstance, or on the *final* or determining cause.

The *final* cause is considered false when the error affects the only cause, or all the causes assigned, and it does not otherwise appear that the dispensation was granted for a reason not expressed, but known to the superior ; as also when, apart from the non-existing cause, another but certainly insufficient cause, or one which is known not to have determined the granter of the dispensation, is alleged. Nevertheless, most authors say, and not without reason, that, even if the determining cause is false, the marriage may be held to be valid, *when the error is not known till after the celebration of the marriage* (2).

2. The dispensation remains *valid*, if the error affects only the circumstances required for licitness alone, or if it bears on an impulsive cause, but not on a final one.

It is thus, when there is deception as to a cause that is evidently secondary and insufficient, when there exists another cause that is real and sufficient ; also, it would seem, when a cause sufficient in itself, is found to be false, and another cause, sufficient and true is alleged in the supplica, unless it is apparent that the action of the superior was determined by the former (cf. *Collat. Brug.*, t. X, p. 563) ; finally, when the cause which appears to be the principal, or is even the only one alleged, is found to be false, if it is known that, on that occasion, the superior did not look at the reasons assigned, but dispensed for reasonable causes known to himself. This last case occurs, as we have already seen (at the end of n° 375, in a note), according to the *Normae Peculiares*, c.

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1. The *Collat. Brug.*, t. X, p, 562, quote the text of this provision ; cf. t. XIII, p. 96.

2. Cf. *Collat. Brug.*, t. X, p. 562 and 563 s.

VII, art. III, n° 21, in the case of dispensations granted by the Holy See from the *minor* impediments. These dispensations « shall have the same force as if they were granted *ex motu proprio et ex certa scientia*, and shall not be liable to challenge on the ground of obreption or subreption ».

II. With regard to **the time** when the error occurs :

404. To vitiate a dispensation, the error must exist at the time of granting or of fulmination.

In our opinion, account is to be taken only of errors that exist *at the time when a dispensation is granted in gracious form, or when one granted in commissarial form is fulminated*, that is to say, not when the decree of concession or of fulmination is communicated, but when it is signed at the Chancellery. Consequently, if, at that time, the facts set forth are true, the validity of the dispensation is not affected by an error existing at the time of the drawing up of the supplica, or at the time when the order to dispense was given by the author of the dispensation, nor yet by a change supervening between the fulmination of the dispensation and the celebration of the marriage (1).

The reason of this is, that the condition expressed or understood in the rescript, and demanding the truth of the facts, affects the very granting of the dispensation ; but this takes place, for a dispensation in gracious form, at the time when the favour is granted by its author, and, for a dispensation in commissarial form, when it is applied by the executor, rather than when the order to dispense is given.

We must *except* the case in which the cause is false at the time of the supplica, but in which it is made true *wilfully* before the granting or fulmination of the dispensation, e. g., the case of sexual relations falsely alleged, but afterwards established in order that the allegation may be true at the time the dispensation is granted (2). In like manner, the validity of the rescript would be *doubtful*, if, *in bad faith*, there had been inserted in the supplica an erroneous statement that ceased to be so before fulmination of the

1. Cf. *Collat. Brug.*, t. VI, p. 181 s., where we have explained the whole controversy. The exception, of which, we have spoken above, in nos 387, 2, and 388, should also be noted ; vir. the validity of the dispensation is not destroyed when the diocese of domicile of the petitioners, as mentioned in the document, has been changed before the execution of the rescript from Rome.

2. Cf. *Collat. Brug.*, t. VI, p. 181, in the note.

dispensation, e. g., a scandal that was at first fictitious but afterwards became real before the execution of the dispensation.

Observation. In case of *doubt,* whether of law or of fact, as to the nullity of the rescript, it is best to have recourse to the Holy See. (*Collat. Brug.*, t.X, p. 565, where we give a specimen of the form to be then employed). It seems, however, that in a doubt of law as to the validity of a rescript of dispensation, it would be safe to proceed to the execution of it, as the Church would, if necessary, supply what was wanting, especially in a case of urgent necessity, e. g., if everything had been prepared for the wedding, even though there was no danger of defamation. See above, n° 368, where the principles governing the Church's supplying are laid down, which principles seem to be applicable here, though there is no question of exercise of jurisdiction.

Corollary. From all this there results an important practical conclusion. The dispensation will be invalid, if there supervenes a fresh impediment *before* the concession (in gracious form) or *before* the fulmination (in commissarial form) ; on the other hand, it will remain valid, if the impediment supervenes only *after* the fulmination has been regularly and validly effected, though before the celebration of the marriage (1). Consequently, if to the impediment of consanguinity, for which a dispensation had been sought, there came to be added, before fulmination, the impediment of illicit affinity, both impediments would have to be removed, not merely the fresh impediment, but that of consanguinity also, because the dispensation granted for that has become null ; on the other hand, if the illicit affinity arose *after* fulmination of the former dispensation

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1. In the case in which illicit affinity has been mentioned in the supplica, and the party concerned has established fresh illicit relations with the same kinswoman of his bride before fulmination of the dispensation, this fact is not regarded as giving rise to a fresh impediment, and so the dispensation is not rendered null. Many authors even admit that there is no new impediment, when the guilty party resumes intercourse with the said kinswoman *after* fulmination. In view of this controversy, Gasparri concludes, o.c., 704 : « If it is a question of a prospective marriage, recourse should again be had for a dispensation ad cautelam ; but where a marriage already contracted is concerned, the marriage must be held valid, until the Holy See has decided otherwise » ; but in the edition of 1904, n° 797, he gives as certain the opinion that denies the existence of the impediment.

had been regularly effected, a dispensation from the impediment of illicit affinity alone would suffice (1). Cf. *Collat. Brug.*, t. V. p. 611 s.

Paragraph II. METHOD OF REMEDYING DEFECTS IN A DISPENSATION.

I. How a vitiated dispensation is to be remedied.

405. How to remedy a defect in a dispensation, and for which forum.

1. One must either obtain *a fresh dispensation*, particularly when the determining cause was false ; or one must procure a letter known as, *Perinde Valere* (2).

2. Recourse must be had to one or the other forum, according to the nature of the defect invalidating the dispensation. As an example, let us suppose the most frequent and the most complicated case, that in which the defect arises from an unmentioned impediment, or from a fresh supervening impediment.

a/ When the vitiated dispensation has been granted *for the external forum :* if the impediment coming to light or supervening is also *of the external forum*, revalidation of the former dispensation as also dispensation from the fresh impediment are effected *for the external forum*, or a dispensation from the two impediments must be asked for *in the external forum.* If the new impediment is *of the internal forum*, a dispensation from it must be given *for the internal forum*, and the vitiated dispensation must be revalidated for the same forum, mention being made in the same supplica of the two impediments.

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1. We say « after fulmination *regularly effected* », which supposes at the time of fulmination or of concession in gracious form, *acceptance*, at least implicit, by the party concerned, and included in the knowledge that the dispensation has been asked for. If there has not been even implicit acceptance, the fulmination is not considered as being regularly and effectively made, or rather its effect is suspended until the said condition required for validity has been fulfilled, according to what has been said in nº 392. It would thus seem that we must say, that, if the fresh impediment supervenes after fulmination but before *even implicit acceptance*, the dispensation would be null and it would be necessary to obtain a new dispensation for each impediment.

2. By a letter of this kind the favour previously granted is revalidated, so that by a fiction of the law the effect of the revalidation is regarded as going back to the time of the original granting of the dispensation. See the *formula* in the *Collat. Brug.*, t. X, p. 565.

b/ When the vitiated dispensation was granted *for the internal forum :* if the new impediment is of the *same forum,* it will be necessary to dispense from it *in the internal forum,* and to revalidate in the same forum the previous dispensation, or to obtain a dispensation from the two impediments *in the internal forum.* If the fresh impediment is *of the external forum,* a dispensation from it must be obtained *for the external forum* and both dispensations must be revalidated *for the internal forum,* that which had been previously granted for the internal forum and that which had been invalidly given for the external forum. A twofold recourse must then be had, one to the external forum in respect of the fresh public impediment, and another to the internal forum ; this latter supplica must make mention of the two impediments and in it the precautions must be taken that we have pointed out above, in n° 384, for simultaneous recourse to the external and internal forum.

c/ When *simultaneously* a dispensation was sought from an occult impediment *in the internal forum* and from a public impediment *in the external forum,* if the fresh impediment is *occult,* a dispensation from it must be obtained *in the internal forum,* and the dispensation invalidly granted in the internal and external forum must be revalidated for the internal forum, mention being made in the supplica of the three impediments (1).

If the fresh impediment is a *public* one, dispensation from it must be obtained *in the external forum,* and in the same forum the previous dispensation of the external forum must be revalidated, or a dispensation from the two impediments must be obtained for the external forum ; moreover, the dispensation granted in the external forum from the two public impediments must be revalidated *for the forum of conscience,* mention being made in the supplica of the three impediments, and the precautions necessary for simultaneous recourse to the external and internal forum being observed (see above, b/).

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1. See in the *Collat. Brug.*, t. X, p. 70 s., an analogous case requiring a like solution, viz., that in which a dispensation was sought for the external forum from the impediment of consanguinity, and for the internal forum from the impediment of occult affinity, without mention being made of the public impediment.

II. By whom the revalidation is to be made.

406. *Power of revalidating,*

In general, a vitiated dispensation must be revalidated by one who has the power at once of granting dispensation from the impediment invalidly removed, and of dispensing *cumulatively* from the impediment omitted or supervening before fulmination. Consequently :

in the case of the Pope;

A. **The Sovereign Pontiff** can revalidate *all* dispensations, however vitiated, provided the impediment recently discovered or supervening falls within the limits laid down in n° 350. The Pope grants revalidation through the various Congregations, according to the nature of the impediment and the forum to which recourse is to be had, as stated above, in n° 351.

B. **The Bishop** or **Ordinary** :

of the Ordinary,

1. Can revalidate dispensations *that he has himself granted* invalidly, provided he has the power of dispensing *cumulatively* from the fresh impediment at the same time as from that, or from those, invalidly removed. Observe that a dispensation, even of the external forum, that is invalid on account of some occult defect, e. g., through the omission of an occult impediment, requires revalidation only for the forum of conscience (1).

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1. Thus, if, after dispensing invalidly from occult affinity in a case of urgency, there comes to light an occult impediment of crime without contrivance, omitted in the supplica, the Ordinary will dispense from this impediment, and also from the previous one, by revalidating the original dispensation in virtue of the quinquennial indult of the S. Poenitentiaria, which he can use cumulatively. In like manner, for the external forum, he can revalidate a dispensation from consanguinity in the third degree, invalid on account of an omitted impediment of licit affinity in the same degree; this he can do in virtue of the quinquennial faculties of the Propaganda and of a special indult that he has for cumulating. In an urgent case, he can also revalidate a dispensation from consanguinity in the third degree, invalid through the omission of an impediment of occult affinity or of occult crime without contrivance. He dispenses from the occult impediment in virtue of the Pagella of the S. Poenitentiaria, and revalidates for the forum of conscience the dispensation from consanguinity granted for the external forum, in virtue of a legal provision, of which we have spoken above in n° 367, following which, according to the decree of the C. S. O., of 1897, the Bishop can dispense from a public impediment occurring in conjunction with an occult impediment, provided he has obtained the power of dispensing separately from the two impediments. Cf. on this subject, *Collat. Brug.*, t. VIII, p. 190-200, and above, n° 377. Finally, when the dispensation from consanguinity is known to be

2. As concerns *Apostolic* dispensations :

a/ *In virtue of his delegated power,* the Ordinary possesses various faculties for revalidating invalid dispensations granted by the Holy See.

For this purpose are the faculties, formerly granted for a year by the S. Poenitentiaria (1), which are now, from the year 1913, granted, with a change in text and scope, by the S. C. de Sacr., so that, besides the indult of which we have spoken above in n° 381, he has an indult for revalidating « letters of matrimonial dispensation, sent by the said Sacred Congregation concerning any canonical impediment, that may be null in consequence of some

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invalid on account of occult crime with contrivance, the Bishop will dispense from it, in an urgent case, by his ordinary power, and by the same power he will revalidate for the internal forum the invalid dispensation of the external forum.

1. These annual faculties of the S. Poenitentiaria may be found in the *Liber Manualis*, for the diocese of Bruges, p. 208 s. Apart from the faculty of which we have spoken above in n° 381, the most important of them were those : a) « of revalidating dispensations from any impediment whatsoever granted by the Holy See, when the petitioners, *in good faith*, had omitted to mention impediments from which the Bishop has power to dispense in virtue of other powers lawfully obtained, but on condition of observing all that is prescribed in the said letters of dispensation ». b) « Of dispensing or revalidating dispensations forwarded by the Apostolic See, that were null *owing to the dispensation having been granted for degrees of affinity, when it was asked for degrees of consanguinity, and vice versa*, provided it was obtained for an impediment that did not touch the first degree ». c) « Of revalidating dispensations from any impediment forwarded by the Apostolic See, that were null, *because scandals or other evils did not result* from the carnal intercourse established between the petitioners and alleged in the supplica as a final and sole cause with the usual clauses : ne mulier infamata etc., when it happens that the Official or other executor of the dispensation finds, through his inquiry, that the woman did not become pregnant, and supposing that what has taken place remains secret ».d) « Of dispensing or revalidating dispensations from every impediment forwarded by the Holy See, that are null *through the omission, made in good faith by the petitioners, of occult affinity arising from illicit intercourse* even for the case in which this impediment is discovered by the executor before all is ready for the marriage, if there is reasonable cause to fear incontinency or other very grave evil owing to the great distance of the episcopal city from Rome. If the impediment of affinity arises from intercourse of the man with the mother of the bride, it is necessary that the birth of the latter should have preceded the relations with the mother ».

other impediment undeclared but detected before the execution of the letters, but which is of the same kind and degree, owing to the multiplicity of lines and stocks ; or even of a lower degree as here stated, viz., of consanguinity and affinity in the third or fourth degree, equal or unequal, provided it does not touch the first ; of public illicit affinity in the collateral line, spiritual relationship and public decency arising only from properly dissolved betrothment : the form and text of the letters being observed in all other respects » (1).

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1. Cf. *Collat. Brug.*, t. XVIII, p. 239 ss., where a short explanation is given and a comparison made with the text of the annual faculties hitherto granted by the S. Poenitentiaria. The following are the principal points requiring attention :

a/ The faculties have reference to letters of dispensation, whether in marriage *contracted* or *to be contracted ;* for the words of concession are general and without any restriction.

b/ They regard only rescripts *of the external forum*, and only those emanating *from the S. Congregation of the Sacraments*, as stated in the text.

It should be observed that the faculty of revalidating *for the internal forum* is no longer mentioned ; this is not surprising seeing that the S. Congr. de Sacramentis has authority over the external forum alone. That faculty would have to be obtained from the S. Poenitentiaria, whose business it is to provide for the requirements of the internal forum, or it would be necessary for the Bishop to have recourse to his ordinary power in a case of urgency, of which we shall speak immediately.

c/ The impediment undeclared in the letter is supposed to have come to light *before the execution of the rescript.* Should it be discovered only after the rescript is put into execution, there is no longer room for the validation of the rescript, and fresh recourse must be had to obtain a fresh dispensation for the impediment invalidly dispensed, as well as for the newly discovered impediment.

d/ In virtue of this faculty, the Ordinary can revalidate apostolic rescripts *for the external forum*, when an impediment of consanguinity, affinity or public decency, dispensed from as simple, turns out to be multiplex, no matter to what extent, even should it be an impediment of affinity in the first collateral degree that is duplicated ; likewise, when there is discovered a fresh impediment of consanguinity or of licit affinity, not only in the 3rd or 4th degree, or in the 4th mixed with the 3rd, as previously, but also in the 3rd or 4th touching the second, the case when the first degree is touched being alone excluded ; likewise, when there is discovered illegitimate affinity in any degree of the collateral line, or spiritual relationship, even between sponsor and godchild, baptizer and baptized ; the faculty being formerly restricted to compaternity alone. Further, the exercise

b) *In virtue of his ordinary power*, the Bishop can also revalidate dispensations from Rome to the extent and within the limits that, as we have seen above, he can dispense for marriages contracted and to be contracted. Cf. n^os^ 354 and 355, and the *Collat. Brug.*, t. V, p. 613 s.

and of the priest.

C. **The priest** can never revalidate a dispensation granted *by the Holy See* or *by the Bishop*, unless specially delegated for this purpose. But he can revalidate a dispensation granted *by himself*, if the defect arises from the neglect of a formality required for validity, or from the omission of an impediment from which he can dispense cumulatively together with the impediment invalidly removed (1).

Observations. 1. If an apostolic or episcopal dispensation is null *in execution*, owing to the neglect of some element necessary for validity, the executor can recommence the business and dispense anew, without having fresh recourse (2).

2. What we have just said under B. and C., namely, that a vitiat-

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of the faculty is no longer restricted to the case in which the newly discovered impediment was left unmentioned *through good faith on the part of the petitioners*, the present indult being extended to the case of a newly discovered impediment of public crime, which impediment of crime, under the new discipline of the Reformed Curia, is reckoned among the impediments *gradus majoris*.

1. Thus a parish priest can revalidate a dispensation that he has given a dying man, and that is null owing to the omission of an impediment of ecclesiastical law not specially excepted. In like manner a confessor has similar power, if he has granted a dispensation for simple affinity or simple crime, when the impediment was multiplex; but not if he has granted a dispensation from one alone of these impediments, when the two were present, for he cannot dispense cumulatively.

2. The principle, sanctioned by c. 9, X, I, 29, does not apply to this case, namely, that, when once a delegate has discharged his office, he cannot re-assume his mandate. Authors do not apply this legal rule except a/ to the case in which the executor *after observing the form of the rescript*, has executed the rescript invalidly in that, e. g. the cause, at the time of fulmination, was non-existent, so that the execution cannot be taken in hand again if the cause should come into existence again ; or even, according to many, b/ to the case in which the executor *of the external forum*, by a formal sentence, has decreed that there is no place for the execution of the rescript. Cf. SANCHEZ, o. c., l. VIII, disp. 27, n° 39; SCHMALZGRUBBER, o. c., I. tit. 29, n° 40 ss.; FEYE, o. c., n° 733; WERNZ, o. c., n° 641; GIOVINE, o. c., I, p. 151 s. ; GASPARRI, o. c., I, n° 399 ; ROSSET, o. c., n° 2773 ss. ; HEINER, *Grundriss*, p. 172, compared with LEITNER, *Lehrbuch*, p. 456.

ed dispensation can be revalidated by the Bishop or priest who granted it, must be understood in conformity with the doctrine laid down above, in n° 362, 3. Accordingly, if it is a question of dispensation granted for *contracting* marriage, the dispensation must be revalidated *before the celebration of the marriage,* unless the powers of the Bishop or priest extend also to marriages already contracted ; for the faculty of dispensing for marriages to be contracted does not apply to marriages already contracted, as we have observed in the place cited.

The like must be said of the hypothesis given above, in 1. ; if the executor of the (apostolic or episcopal) dispensation has fulminated it invalidly for a marriage to be contracted, he cannot take up the matter again and dispense afresh *after* the celebration of the marriage (1).

1. Cf. *Collat. Brug.*, t. XVI, p. 41 s. Cf., however, n° 393, 4.

Section II

INVALID MARRIAGE AND ITS REVALIDATION.

Observation. The question of a marriage invalidly contracted admits of four different solutions : revalidation, dissolution, good faith, and living together as brother and sister. In the first article we shall inquire what remedy is to be employed under varying circumstances. In the second article we shall treat especially of the ordinary remedy, i. e., of revalidation of marriage, pointing out the number of ways in which this may be effected, and the method to be followed according to the circumstances of the case.

Article 1. Remedy to be employed in the case of an invalid marriage.

407. What remedy is to be employed in case of invalid marriage : 1. if the nullity is public ;

We may here make *two hypotheses :*

I. *If the nullity of the marriage is* public, *or it is feared that it will become so* (1) :

It is then necessary either *to revalidate* the marriage, and as a

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1. This danger arises from the fact that the impediment is already *known* to one or two persons, and will probably be divulged, or *from the nature of the impediment* invalidating the marriage, though the fact is still unknown, at least as an impediment. Of this kind are impediments *public by their nature*, excepting, as occasion requires, those from which the Church is accustomed to dispense for the internal forum, with a view to the contracting of marriage, according to what has been said above in nos 346, 351, 354 and 376. Cf. *Collat. Brug.*, t. XII, p. 11, and 765, where we cite two cases in which the putative spouses were not left in good faith as to the nullity of their marriage *clandestinely* contracted, while in 1906 (and in 1908), the Holy See, when asked by the Ordinary of Bruges, enjoined silence in two cases of marriage invalid on account of *consanguinity* in the 3rd degree mixed with the 4th. Cf. *Collat. Brug.*, t. XI, p. 51, as well as the rescript of the S. C. de Sacr., 3 Feb. 1911, addressed to the Bishop of Strasburg, in the *Str. Diözesanblatt*, 1911, p. 90 s.

general rule this is the better course, or *to separate* the pseudo-married couple and dissolve the marriage. This latter means is to be employed when the marriage cannot be revalidated, or, if it can be, when there are very grave reasons in favour of dissolution (1).

II. *If the nullity is* **occult**, *and there is no fear that it will be divulged :* *2. if the nullity is occult.*

A. When the marriage *cannot be revalidated :*

1. If the *nullity is known* to the reputed husband and wife, or to one of them, the marriage is to be dissolved, or, in very exceptional circumstances, the parties may be permitted to live together as brother and sister.

2. If both parties *are ignorant of the nullity*, they are to be left in good faith, unless there happen to be very grave reasons that make a dissolution necessary.

B. When the marriage *can be revalidated :*

1. If the nullity of their marriage *is known* to one of the parties, or to both of them, the ordinary remedy will be revalidation, unless here again peculiar circumstances call for a dissolution (2).

2. If both parties are *in good faith*, and it is evident that they will remain so ; excepting the very rare case in which a dissolution is preferable, they must be left in that state, or the marriage must be revalidated ; this latter is the usual course. For good faith can be preferred to revalidation only when *neither of the parties can be informed without grave difficulty*, either because it is foreseen that both of them will be indisposed to renew their consent, or because it is feared that the one is ill-disposed, while the other cannot be informed without injury to the reputation of the former ; in all other cases the marriage must be revalidated.

From these various rules we may draw *the following conclusion* : when a marriage is null and admits of revalidation, the choice

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1. In both cases, whether the marriage is to be revalidated or dissolved, separation must be immediately imposed, if the nullity is already public ; in the meantime the dispensation or the authoritative declaration of nullity will be procured.

2. Pending the revalidation of the marriage or the declaration of nullity, the parties must refrain from the use of marriage and sleep apart, if both of them are acquainted with the matter.

nearly always lies between revalidation and good faith ; recourse can be had to the latter only when, on the one hand, the nullity is occult and is in no danger of being divulged, and when, on the other hand, the reputed husband and wife cannot be informed.

Observations. a/ When the parties have to be left in good faith as to the nullity of their marriage, supposing it to be susceptible of revalidation, *it is possible* still to proceed to revalidation by means of a *sanatio in radice*, as will be clear from what we shall say later ; but it is the custom of the Holy See, in such a case, to enjoin silence and to refuse a *sanatio* (1).

b/ When it is decided that the marriage is to be revalidated, there is no need to make the matter known at once to the reputed husband and wife who are in good faith ; it is often better to leave them in ignorance until all is ready for the revalidation ; sometimes, even, it is better to leave them so altogether, as we shall say later in connection with the dispensation in radice.

c/ When a penitent declares that he *doubts* the validity of his marriage, be must be questioned as to the ground of his doubt. If a real reason for nullity is alleged, there must be no dissembling ; but if on the other hand a false reason is given, even though the marriage appears to the confessor really invalid, it may happen that he thinks it inopportune to enlighten the person concerned, for the moment at least ; he can then keep back the information, and reply that the marriage is not null for the reason alleged ; and if the penitent insists, he can tell him that he ought not, on that account, to refuse the marriage debt.

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1. It was thus in the case cited in the *Collat. Brug.*, t. X, p. 70 s. The reason why the Church prefers good faith to revalidation, is perhaps to be found in the doubt as to the perseverance of matrimonial consent (*Collat. Brug.*, t. X, p. 556 s.) ; or rather in the danger mentioned in the *Rev. eccl. de Liège*, 1907, p. 116, namely, that there is reason to fear lest the parties, whose marriage has been revalidated without their knowledge,should afterwards discover the impediment and break off their marriage, in the belief that it is invalid.

Article 2. Revalidation of Marriage.

Paragraph I. VARIOUS KINDS OF REVALIDATION.

I. Marriage can sometimes be revalidated without a dispensation.

408. Marriage can be revalidated: 1. without a dispensation,

It happens sometimes, as we shall state more in detail in paragraph 2, that a marriage may be revalidated without the intervention of a dispensation ; e. g., when it is null through want of consent, or by reason of an impediment that lapses of itself, like impuberty, or that can be removed by the partner himself, like disparity of worship.

It must, however, be carefully noted that,in these cases, marriage is not revalidated by the mere disappearance of the impediment ; it is necessary that *consent should be renewed by the parties become acquainted with the nullity of the former contract*, and this must be done not only when the marriage is null through want of consent, but also when it is invalid on account of some other impediment.

This necessity of renewing the consent does not arise *from the nature of the circumstances*, except in the hypothesis that there was no true consent at the time of the marriage ; for, naturally speaking, the consent, formerly given and virtually enduring, becomes valid of itself as soon as the impediment has disappeared. But this necessity is based *on the positive will of the Church*, which refuses to recognise as genuine a marriage to which virtual consent alone continues to exist after the disappearance of the impediment. The Church requires, regularly and apart from any special derogation, that the consent should be renewed, and that it should be renewed *independently of the former consent, after knowledge of the nullity* (1).

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1. This will of the Church is proved in a general way by various documents and quotations given in the *Collat. Brug.*, t. V, p. 311 ss. ; and notably by the practice of the S. Poenitentiaria, which requires this renewal, and by the decree of the C. S. O., 8 May 1899, the text of which is given in the *Collat. Brug.*, t.IV, p. 666 s. It was a question there of a marriage null on account of disparity of worship, and requiring to be revalidated after the conversion of the unbaptized

2. by means of a dispensation,

II. At other times, marriage can be revalidated with the assistance of a dispensation, by means of *a simple dispensation* or of *a dispensation in radice*.

either by a simple dispensation,

A. **A simple dispensation**, for revalidating a marriage, consists solely in the removal of the impediment, just as if it had lapsed spontaneously ; consequently, here again marriage is not revalidated by the continuance of the consent, but only by a fresh consent to be given after knowledge of the nullity of the former. The union is considered valid, and the children are legitimated, only from the time when the consent was renewed.

or by a dispensation in radice ;

B. **A dispensation in radice**, on the contrary, consists in such a perfect and complete a removal of the impediment, that the consent previously given is held, so far as it depends on the Church, as valid from the beginning ; there is then no need to renew this consent, but the consent still continuing spontaneously assumes validity, and the marriage is treated by the Church and, in accordance with the laws of the Church, must be treated by all as valid from the first, while the children are to be regarded as legitimate by birth (1).

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party. As it was asked if, seeing the ignorance of the parties as to this nullity, the continuance of the consent rendered the marriage valid, an answer was given that it was not valid, *so long as the consent formerly given had not been renewed, after the baptism of the infidel party, by both partners with knowledge of the nullity of the former consent.* This doctrine is confirmed in the *Causa Osnabrugen.*, 11 Jan. 1912 (*A.A.S.*, IV, p. 186), where we are told that the want of consent, vitiated by fear, even after the fear was removed, « could not be supplied by peaceful cohabitation, because the bride (who was under the influence of fear) did not know that the former consent was null and void » ; also in the *Causa Eboracen.*, 1 March, 1913 (*A. A. S.*, V, p. 322). Cf. also Gennari-Boudinhon, *Consult.*, Part I, cons. 119 ; Wernz, o. c., nº 648 s. Cf. in the contrary sense, Sica, o. c., p. 392 s.

1. The Church, in revalidating a marriage in radice, produces a *twofold* effect : *in the first place*, it really revalidates the still existing consent, so that, when once the impediment has been removed, this consent forthwith results in marriage, without there being any need of renewal ; *secondly*, by a fiction of the law, it carries the validity of the consent back to the time when it was given, as if it had been valid from that moment, while it is really so only from the time of the dispensation ; it therefore determines that the marriage so revalidated is to be considered and juridically treated as a marriage valid from the beginning, and that the children are to be held as legitimate by birth. It is in consequence of this

Explanation.

1. If *we compare* a dispensation in radice with a simple dispensation, we shall see that the *principal difference* consists in the fact that, for the revalidation of a marriage by simple dispensation, the Church, as far as it can (1), imposes its positive rule regarding renewal of consent after knowledge of the nullity, while it does not impose it for the revalidation of a marriage in radice ; in this case it allows the virtually continuing consent to constitute the marriage according to its natural aptitude. *difference between them.*

2. From this it follows :

a/ That a marriage can be revalidated in radice only if there has existed on both sides a true matrimonial consent, and only if this consent has really continued. Consequently, a *civil* marriage cannot be revalidated in radice, if the parties have contracted it simply as a secular ceremony ; on the other hand, it can be, if they regarded it as a real marriage (2).

b/ That a marriage, invalid on account of an impediment that has since disappeared spontaneously, e. g., impuberty or disparity of worship, can be revalidated in radice. But such *revalidation* has but an imperfect claim to be called sanatio in radice. Its effect, in this case is not to remove the impediment itself, but to dispense from the necessity of renewing consent, and at the same time to give, by a fiction of the law, the legal title of a validly contracted marriage together with the legitimacy of the children.

If the impediment so disappearing is one of *natural* or *divine* law, e. g., the impediment of *ligamen*, there is still matter for

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fiction, carrying the validity of the consent back to the time when it was first given, that the marriage is said to be revalidated in radice.

1. We shall see, however, that the Church sometimes modifies the severity of its prescriptions as to the renewal of consent, in the special circumstances of which we shall speak below, in nº 410.

2. The following note gives an example of this. Until quite recently, it hardly ever happened that a *civil* marriage celebrated between two persons subject to the law of clandestinity was revalidated, even when it had been held as a true marriage. This was on account of the frequent absence of true matrimonial consent, and also because the Church does not recognise in these civil ceremonies the *appearance of marriage*, and consequently grants the favour of revalidation with greater difficulty. Cf. above, nº 92 and in particular nº 233 ; see also the *Irish Eccles. Record*, 1913, p. 410 s.

revalidation, but with a yet more imperfect effect ; the Church dispenses from the renewal of consent, but it cannot then grant by a legal fiction the validity of the marriage and the legitimacy of the children except from the time of the disappearance of the impediment (1).

c/ That a marriage *actually* under an impediment *not admitting of dispensation,* can by no means be revalidated (2), as the C. S. O. shows practically in its decrees of 17 Jan. and 8 March 1900. The text of these, with a commentary, will be found in the *Collat. Brug.*, t. V, p. 385 ss. (3).

Observations. 1. In revalidation in radice, renewal of consent by the well-disposed party is often required as a condition to be observed in the execution of the dispensation. Continuance of consent is thus better secured (4).

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1. Cf. *Collat. Brug.*, t. V, p. 357, where, from the *Anal. eccl.* 1900, p. 305, we give the case of a Catholic woman who, after a civil marriage contracted on 25 Apr. 1890, during the lifetime of her first husband, after the death of her lawful husband obtained from the S. Poenitentiaria a dispensation in radice, but without the legitimation of her children conceived in adultery. Cf. Gasparri, o. c., nº 1154 ; De Becker, *De Matr.*, p. 348 ; Putzer, o. c., nº 224 ; *N. R. th.*, XXVII, p. 218 s. ; Bassibey, *Le Mariage devant les Tribunaux,* nº 221 ; Pompen, o. c., nº 139 ; Boudinhon, in the *R. du clergé fr.*, t. XLI, p. 416 ss. ; Gennari-Boudinhon, *Consult.*, Ire Partie, *Morale,* II, p. 384 s.

2. We are not of opinion that there is matter for revalidation in radice, even if the marriage, at the beginning, was invalid only because of an impediment of ecclesiastical law, and if there has afterwards *supervened* an impediment of the natural law not admitting of dispensation, e. g., impotency. The reason is that revalidation affects precisely the *actually* continuing consent which, in the case given, cannot be revalidated. Even *complete legitimation of the children* may be accorded, but not a true revalidation of the marriage, as we have observed in the *Collat. Brug.*,l. c., in a note on p. 357 ; cf. p. 386 s. and the *Canon. Contemp.*, 1900, p. 350 s. ; Pompen, o. c., nº 139.

3. The first case given is that of a revalidation in radice asked for by a converted pagan in favour of a second marriage contracted by him after his conversion, without having first put the obligatory questions to his first wife remaining unbaptized. The C. S. O. replies that such revalidation is impossible, but that a dispensation from the interpellations must be obtained and then the second marriage contracted afresh, because, for the time being, the first marriage contracted in infidelity keeps its full force ; and consequently to a revalidation in radice of the second marriage or pseudo-marriage there is opposed the impediment of *ligamen.*

4. This renewal of consent does not revalidate the marriage, as when a simple

2. To revalidation in radice apply the various distinctions made above, in n° 346. It can be granted in gracious or in commissarial form (1), for the internal or external forum, or in the form proper to the internal forum, but in such a way that it can produce its effect in the external forum (2).

3. *Ordinaries*, in our countries (3), have no power to revalidate in radice ; so it is always necessary to obtain the favour of this revalidation from the Holy See.

Paragraph II. METHOD OF REVALIDATING A MARRIAGE.

We must now inquire more closely : 1/ when revalidation is to be effected with or without a dispensation, and when a simple dispensation or a sanatio in radice is to be employed ; 2/ how the renewal of consent is to be made, when there is occasion for it.

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dispensation is given, but it fulfils a condition required for the execution of the rescript of revalidation.

1. Specimens may be seen in Planchard, *Dispenses*, n^os^ 382 and 383 ; *Collat. Brug.*, t. VI, p. 600 and 602 ; t. XII, p. 110 s. and 765 s.

2. Cf. *Collat. Brug.*, t. VI, p. 602 ; above, n° 346, 2, in note ; cf. the case solved in the *Anal. eccl.*, 1900, p. 305 s.

3. The text of the indult, inserted under art. 6, Formula D, enjoyed, among others, by the Bishops of the United States of America, reads thus : « Sanandi in radice matrimonia contracta, quando comperitur adfuisse impedimentum dirimens, super quo, ex Apostolicae Sedis indulto, dispensare ipse possit, magnumque fore impedimentum requirendi a parte innoxia renovationem consensus, monita tamen parte conscia impedimenti de effectu hujus sanationis ».

For the interpretation of this indult, cf. the answers of the C. S. O. 22 Aug. 1906, to the Bishop of Covington ; 2 Dec. 1908, to the Archbishop of Cincinnati, and 20 Apr. 1910, to the Bishop of Natchez, in the *Ecclesiastical Review*, t. XXXV (1906), p. 627 ss., t. XLIII (1910), p. 57-69 and 168-183 ; compare *Collat. Brug.*, t. XII, p. 139 ss. The following are the points calling for particular attention : a/ that the indult sanandi in radice is also extended to the cases of the faculty of 1888, for the dying ; b/ that it can be used even where both parties have knowledge of the nullity, but one of them cannot be induced to renew consent ; c/ that the indult, unless supplemented, cannot be used for putting right, in radice, marriages invalidly contracted on the ground of clandestinity (i. e., contracted before the 18 Apr. 1908 in places subject to the decree *Tametsi*, or afterwards under the discipline of the *Ne Temere*), since Bishops in the United States do not possess the power of dispensing from clandestinity.

409. Whether, and what dispensation is needed, when a marriage is null: 1. through want of consent;

First point: In what cases dispensation is to be obtained, and what dispensation.

We must make a threefold distinction:

I. *When a marriage is invalid* **through want of consent**, i. e., when it has been contracted with a simulated consent, or by a demented person, or though fear or error:

There is no room for dispensation (1), but it is enough to renew the consent in the way pointed out below. Consent must be renewed by *both* parties, if the consent on both sides was vitiated; by *one party only*, if the consent of the other was valid and virtually continues; it is better, however, that consent should be renewed by both parties in every case, if that can be done without grave inconvenience. Cf. Theol. Mechl., o. c., p. 348 s.

2. through want of the formalities of consent;

II. *When a marriage is null* **through defect in the form of consent**, because the formalities required for validity by the law of clandestinity have been neglected:

1. *Regularly, there is no room for dispensation*, but the consent must be renewed by the two parties, and in the prescribed form, as will be stated below.

Exceptionally, recourse can be had to *revalidation in radice*, when in some place there are many marriages null on the ground of clandestinity (2), or when the nullity arises from the fault of the Ordinary or of the parish priest, that it is important to keep secret; likewise, when one of the parties is well disposed but the other will not renew his consent, or at least will not do so in the prescribed form (3), or when both parties are ignorant of the im-

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1. Strictly speaking, either a simple dispensation or a revalidation in radice could be granted in the case of a marriage null through error as to (servile) condition; but in practice recourse is not had to a dispensation, but to free revalidation by renewal of consent. Cf. above, nº 264.

2. Thus, in the Constitution *Provida*, 1906, the Holy Father decreed that all mixed marriages, invalidly contracted before Easter 1906, owing to the defect of clandestinity, supposing the absence of any other impediment and the continuance of consent, should be revalidated in radice. Cf. *Collat. Brug.*, t. XI, p. 289 s.

3. Such a case is cited in the *Anal. eccl.*, 1900 p. 305 s., which should be read in connection with a rescript of 8 Aug. 1910, given by Victorius ab Appeltern, o. c., p. 184 s. If both parties know of the nullity of their marriage and

pediment and are ill disposed or can with difficulty be informed of it (1). In these cases, a revalidation must be obtained *for the external forum*, or, if it is granted in the form proper to the internal forum, one must be able to produce it in the external forum, should the nullity become public (2).

III. *When a marriage is null owing to an impediment* **that renders the contracting parties incapable :**

3. through an impediment that renders one incapable of contracting :

A. If it is a question of an impediment that has *disappeared spontaneously or by the act of the parties* (3) :

1. *Regularly, there is no room for dispensation,* but it is necessary and sufficient that the two parties renew their consent in the manner shown below.

a) whether disappearing spontaneously,

2. *Exceptionally,* recourse can be had to *sanatio in radice,* not to remove the impediment, which is supposed to have come to an end, but to do away with the necessity of renewing the consent, and to make the still continuing consent forthwith valid. We have said that such revalidation is imperfect.

A dispensation of this kind can be obtained in favour of the well-disposed party, when the other will not renew consent, or when both parties are ignorant of the nullity of their union and can with difficulty be informed of it, when there is reason to fear that the nullity will become public. The revalidation would be required for the internal or external forum, or at least in such a way that it could be produced for the external forum, according

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they both refuse to renew their consent, it is useless to apply to Rome, in their favour, for a dispensation in radice. Cf. De Becker, *De Matr.*, p. 362 ; Bassibey, *Le Mariage*, n° 210. It is possible that, if one of the parties refuses to renew consent personally before the parish priest, he may be induced to do so *by proxy*.

1. In these cases, it is with difficulty that they can be left in good faith, because, given the nature of the impediment, there is reason to fear that the nullity will become public. Examples of this kind are given in the *Collat. Brug.*, t. VI, p. 599 s. ; XII, p. 119 and 765. Cf. also Gennari-Boudinhon, *Consult. — Morale*, I, p. 253.

2. Cf. n° 346, 2, and the passages cited ; see also the case solved in the *Anal. eccl.*, 1900, p. 305 s., and again Victorius ab Appeltern, l. c.

3. E. g., marriages invalid on account of disparity of worship, after the baptism of the infidel party ; or a marriage invalid by reason of the impuberty of one party, now arrived at the state of puberty.

as the nullity is and will remain secret or otherwise, as stated in nº 407.

b) or requiring to be removed by a dispensation.

B. If it is a question of an impediment *that can be removed only by a dispensation :*

1. If *both* parties are *in good faith :* a/ if they are both well disposed and can be informed easily, a *simple* dispensation will be obtained, for the internal or external forum, in accordance with what we have just said under A, and the two parties will renew their consent in the manner shown below.

This case occurs, e. g., when the parish priest discovers that a marriage is null on account of consanguinity or licit affinity. Ordinarily, the contracting parties are well disposed and ready to renew their consent, and there is no difficulty about informing them. The same may also be true, when the confessor perceives that a marriage is null owing to an impediment of crime, in which both parties have taken part, or by reason of an impediment of illicit affinity, known to both.

b/ If one party only can be informed, recourse must be had to a *dispensatio in radice.*

c/ If neither of them can be informed, and the reputed husband and wife cannot be left in good faith, because there is reason to fear that the nullity will be made known, recourse must also be had to a *dispensatio in radice,* and it must be obtained in the form proper to the internal forum, but in such a way that it may be produced in the external forum (1).

2. If *both* parties *know of the nullity* of their marriage, it is necessary to obtain a simple dispensation or a dispensation in radice, according as they are both well disposed for the renewal of their consent, or one of them is not.

3. If *one* party only *has knowledge* of the nullity of the contract :

a/ When the other can be informed, a *simple* dispensation must be chosen.

b/ When the other cannot be informed, if the matter admits of delay, a *dispensatio in radice* should be sought, otherwise recourse should be had to a *simple dispensation.*

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1. There is a very clear example of this in the case cited in the *Collat. Brug.*, t. VI, p. 601 s., with the rescript from Rome annexed. Cf. nº 407 and the note.

We will suppose that a confessor discovers the nullity of a marriage due to illicit affinity, and that the penitent is aware that his marriage is invalid. Generally, the other party will be ignorant of this, and cannot be informed of it without injury to the reputation of the former. Here we have the hypothesis indicated in b/. If, then, the penitent, under any pretext and without causing his partner to suspect that there is something very much amiss, can withdraw himself from the marriage debt until a dispensation in radice has been obtained from the Holy See, this will put, everything right, since it does away with the difficulty about the renewal of consent. If, on the other hand, abstention from intercourse during the necessary time would expose the penitent himself to the danger of incontinency, or give rise to grave suspicions on the part of his partner, recourse should be had to the Bishop, from whom a simple dispensation will be quickly obtained ; or the confessor will himself dispense, if he has the requisite faculties (1). In the case of a simple dispensation, consent will have to be renewed in the way we are about to point out.

Second point : METHOD OF RENEWING CONSENT.

410. Method of renewing consent :

We are supposing that consent has to be renewed for the very revalidation of the marriage, and not merely, as sometimes happens in a dispensation in radice, for the fulfilment of a condition necessary to the execution of the rescript, in which case one must keep to the text of the document.

a) when the formalities of consent have been neglected ;

1. If there has been neglect of the form of consent required for validity by the Council of Trent or by the decree *Ne Temere*, i. e., if the marriage is null on the ground of clandestinity : consent must be renewed *in the form prescribed by the decree « Ne Temere »*, if the marriage to be revalidated falls under it.

In itself, the consent should be renewed *publicly*, when the nullity is publicly known, that so the scandal may be removed. When

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1. In the diocese of Bruges, in case of want of time for recourse to the Bishop, the *confessor* can grant the dispensation in question, in virtue of the faculties granted to confessors in 1907, in relation to marriages contracted and to be contracted. Cf. nº 369 ; and *Collat. Brug.*, t. XVI, p. 42 ss. and 190 ss., where we observe that the powers granted to *parish priests*, as such, do not here extend to marriages already contracted.

the nullity is not known, the renewal will take place *in secret* before the parish priest or his delegate and two witnesses chosen from among the friends of the parties, as in the case of a marriage of conscience, of which we have spoken above, in n° 94 (1). Even when the nullity is public, a secret renewal may sometimes be permitted, or at least any public act may be dispensed with, when the Bishop's permission has been obtained, and on condition that the marriage is made public at a fitting time, and scandal avoided.

2. If the form of consent has been observed :

b) when they have been observed ;

Consent must be renewed according to *the form prescribed by Pius X,* or it is sufficient that this should be done *in private and clandestinely*, according as it is a question of a marriage the nullity of which *is or will be publicly known*, or of one the nullity of which *is secret and will remain so*. Thus, *in general*, one must proceed in the form of the decree *Ne Temere,* when a marriage is null by reason of an impediment that is public *in fact or by its nature*, but not when it is null owing to an impediment that is *occult at once by its nature and in fact*, as we have said in a note to n° 407, and above, in n^{os} 346, 351, 354 and 376.

If the consent has to be renewed before the Church, it must, in itself, be done *publicly* ; if a secret renewal is considered more opportune, care must be taken that the marriage is made public, as we have said above, but this disclosure may be postponed until the nullity is really a matter of public knowledge.

in both cases knowledge of the nullity is necessary for the renewal ;

3. In both cases, that is to say, whether the form of consent has been neglected or not in the original marriage, and whether the renewal has to be made in the form prescribed by Pius X or in private, it is necessary, before renewing consent, that the parties *should be aware of the nullity* of their marriage (2), as we have pointed out in n° 408. One or both of the parties must have this

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1. If the nullity is discovered by the confessor or by some other priest who is neither the parish priest nor his delegate, he can obtain from the Bishop the requisite delegation.

2. There is no need to inform the parties concerned of the cause of the nullity and, if it is of a defamatory nature, one cannot do so, according to the directions usually given by the S. Poenitentiaria in its rescripts and indults. Cf. above, n° 380.

knowledge, according as the new consent is required of one only or of both (1).

Thus it is necessary that the party or parties ignorant of the impediment *should be informed of the nullity*. This information must be imparted prudently and at a suitable time, and, if possible, it should be deferred until the dispensation has been obtained and everything is ready for the renewal of consent, as we have already stated in article 1 (2).

Nevertheless, the giving of *this information* naturally involves *grave difficulties*, especially in the case given above, when the penitent knows that his marriage is invalid on account of a discreditable impediment, e.g., illicit affinity, while his consort is ignorant of it. Frequently, in these circumstances, the confessor cannot have recourse to revalidation in radice owing to the very grave difficulties that arise in connection with the use of the marriage ; and we have seen that he must content himself with applying to the Ordinary for a simple dispensation, which regularly implies the enlightenment of the unoffending party.

But, in such difficult circumstances, one can apply the rule of conduct laid down by the S. Poenitentiaria itself, when it dispenses from an impediment of a defamatory nature. After prescribing that the partner is to be informed, it now adds, at least ordinarily : « *and if this information cannot be given without grave inconvenience, consent must be renewed in accordance with the rules given by approved Authors* » (3). Here, then, the Church tempers its severity in requiring that the nullity should be known, which, after all, is only a matter of ecclesiastical legislation.

means of informing the partner.

Authors propose *various means*, to be employed according to circumstances :

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1. We have seen above, in nº 409, that fresh consent is required only of the party who gave an invalid consent in the first instance.

2. When it is a question of an impediment occult by nature, it is often better that the party ignorant of it should be informed by the other party, who will give the former to understand that there was an irregularity in the celebration of the marriage, that consent was not properly given, that his confessor has told him so, and so forth ; by which means he will induce the other party to renew consent, without revealing the cause of the nullity.

3. The like is found in the indult granted to Ordinaries, of which we have spoken in nº 360.

a/ *A doubt* can be raised or a *suspicion* expressed as to the validity of the marriage. For instance, the one who knows of the nullity might tell the other that he has misgivings as to the validity of the marriage they have contracted, and that, for the peace and quietness of his own conscience, he wants to renew the consent, at the same time saying : « I marry you... will you marry me ? ». If such a course seems inexpedient :

b/ « Let the partner prudently be induced to renew consent *conditionally*, without... (direct) expression of any doubt as to the validity of the former marriage. For instance, the one acquainted with the nullity might say : « I love you so, that, if we were not married, or if for any reason our marriage were invalid, I would marry you anyway, — in fact, I do so now. Will you do the same for me ? » (1).

If this course cannot wisely be taken, for fear of giving rise to grave suspicions or of experiencing a refusal of consent, there remains but this last resource :

c/ *The party having knowledge of the nullity will renew consent alone*, internally and externally, e. g., in performing the marriage act with conjugal intent. This new consent, joined with the virtually continuing consent of the other party, can be considered as sufficient for revalidation, since the Church is willing to relax so far the strictness of its law.

Observations. 1/ The sacrament of matrimony is received at the time the contract is revalidated in radice, or, where there is no dispensation in radice, when the new consent is given. One must, therefore see, as far as possible, that the parties are at that time *in a state of grace.*

2/ When a marriage is revalidated *before the Church*, i. e., in the presence of the parish priest and two witnesses,if it is done *secretly*, the liturgical ceremonies are omitted,and the formalities prescribed for validity by the Decree *Ne Temere* are alone employed ; if it takes place *publicly* in the church, the ordinary rites must be observed, omitting only the blessing of the ring already blessed (2).

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1. Theol. Mechl., o. c., p. 353.

2. As to the *solemn blessing*, if it is not to be omitted for other reasons, it would seem that it ought to be given,since at the former celebration it was given invalidly. Cf. Gasparri, o. c., nº 1130, at the end.

When the revalidation is effected *in private* and without any ecclesiastical form, the consent can be renewed between the reputed husband and wife without any witness and by any external sign whatsoever. It is, however, better and more becoming, if nothing stands in the way, that this renewal should take place in the presence of a priest, e. g., of the confessor, if both parties are well disposed and know that the priest is acquainted with the matter.

411. Some observations on the asking for and execution of the dispensation,

Scholion I. From what has been said in chapter II of the First Section and in n° 408, it is clear that the Bishop of Bruges has no power whatever for *revalidating* a marriage *in radice* ; consequently, for this dispensation recourse must always be had to the Holy See. On the other hand, he has very extensive powers, both delegated and ordinary, for granting simple dispensations for revalidating a marriage. Priests, also, can use the powers mentioned above, within the limits fixed in n° 369, both for marriages to be revalidated and for those to be contracted (1).

In *having recourse* to the Holy See or to the Ordinary for the revalidation of a marriage, the rules laid down in chapter IV must be observed, and attention given to the various formulas to be found at the end of this work (2).

In *executing* an apostolic rescript, the rules are the same as those given in chapter V ; but it must be observed that, in this case, there is added in the document a special clause as to the renewing of consent and the informing of the party ignorant of the nullity ; also, that, considering the matter, the formula of fulmination has to be slightly modified. Apart from this, there is no special rule to be observed by the Ordinary or priest who dispenses for the purpose of revalidating a marriage (3).

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1. Remember what was said in n° 362 ; the power of dispensing, granted without restriction, holds good for marriages contracted and to be contracted, but the faculty granted specifically for marriages to be contracted cannot be extended to revalidation.

2. The favour of a *sanatio* is obtained in the name of the party, if cognizant and well-disposed ; otherwise it is applied for in the name of the person having recourse. Cf. *Instr. du Vicariat de Rome*, l. c., p. 620.

3. Accordingly, a confessor, executing for the internal forum a dispensation of the S. Poenitentiaria, after verifying the facts, imposing the conditions and particularly admonishing the penitent that he must renew his consent, at the

Scholion II. In the whole of this treatise on the revalidation of marriage and the procedure to be employed, it is assumed that recourse can be had to dispensation for the removal of the impediment, when necessary. It may, however, happen that a marriage has been invalidly contracted on account of an occult impediment, with the knowledge of one party, while the other cannot be informed of the fact, as in the last hypothesis mentioned towards the end of n° 409, and that, while the confessor has not power to dispense, there is not time to have recourse to the Bishop the same day. In that case, if it is evident that the rendering of the debt cannot be avoided (e. g., by the wife) without very grave difficulty, it would seem that there is ground for applying the doctrine proposed above in n° 378, viz., the confessor can declare that the impediment ceases in these difficult circumstances, and the revalidation of the marriage can be proceeded with without a dispensation, in the way described in n° 410, that is to say, by renewal of matrimonial consent by the party with knowledge of the nullity, even, if there is no other way, by intercourse had with conjugal intent. This should not interfere with subsequent recourse to the Bishop for his instructions (1).

and on registration.

Scholion III. We must add a few words here on the subject of *registration*. 1. If the former marriage *was clandestine*, when the revalidation is, or will be, made *public*, the marriage will be registered in the ordinary way, according to what has been said in n° 338 ; when the revalidation is, and will remain, *secret*, one must proceed as in the case of a marriage of conscience, following the rule given above in n° 94.

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same time telling him how to obtain the same from his consort, absolves him from censures and, in fulminating the dispensation, says : « Insuper Apostolica Auctoritate, mihi specialiter delegata, dispenso tecum super impedimento..., quo ligatus matrimonium nulliter contraxisti, ut memorato impedimento non obstante, denuo matrimonium cum tuo(a) putato(a) conjuge, renovato consensu, contrahere, consummare et in eo manere licite possis ». If it is a question of a *dispensatio in radice*, it is sufficient to say : « Insuper Auctoritate Apostolica, mihi specialiter delegata, matrimonium a te contractum cum tua(o) putata(o) conjuge in radice sano... ». Cf. POMPEN, o. c., n° 151 s. The confessor will use the same form, making the necessary changes, when dispensing in virtue of the delegated power.

1. Cf. GENICOT-SALSMANS, o. c., n° 468.

2. If the former marriage *was not clandestine,* when the nullity was *public,* the revalidation will be entered in the marriage register, in the margin of the original entry ; at the same time care must be taken that mention of the revalidation is made in the baptismal register, in accordance with what we have said in n° 338 ; on the other hand, if the nullity of the marriage was occult, no entry will have to be made (1).

1. When the nullity of the former marriage is not as yet known, but threatens to become so, considering the nature of the impediment, and for this reason revalidation has taken place before the Church, if it seems that the fact cannot well be mentioned in the public register, the parish priest will refrain from entering it, but will preserve with care and secrecy the record of revalidation drawn up in regular form.

LAUS DEO SEMPER.

SUPPLEMENT I.

Decretum Ne Temere circa Formam Sponsalium et Matrimonii

cum

præcipuis decisionibus illud illustrantibus.

I. Decretum *Ne Temere.*

Ne Temere inirentur clandestina conjugia, quæ Dei Ecclesia justissimis de causis semper detestata est atque prohibuit, provide cavit Tridentinum Concilium, *cap. 1, Sess. XXIV de reform. matrim.* edicens : « Qui aliter « quam præsente parocho vel alio sacerdote de ipsius parochi seu Ordi- « narii licentia et duobus vel tribus testibus matrimonium contrahere atten- « tabunt, eos Sancta Synodus ad sic contrahendum omnino inhabiles reddit, « et hujusmodi contractus irritos et nullos esse decernit ».

Sed cum idem Sacrum Concilium præcepisset, ut tale decretum publicaretur in singulis parœciis, nec vim haberet nisi iis in locis ubi esset promulgatum : accidit ut plura loca, in quibus publicatio illa facta non fuit, beneficio tridentinæ legis caruerint, hodieque careant, et hæsitationibus atque incommodis veteris disciplinæ adhuc obnoxia maneant.

Verum nec ubi viguit nova lex, sublata est omnis difficultas. Sæpe namque gravis exstitit dubitatio in decernenda persona parochi, quo præsente matrimonium sit contrahendum. Statuit quidem canonica disciplina, proprium parochum eum intelligi debere, cujus in parœcia domicilium sit aut quasi-domicilium alterutrius contrahentis. Verum quia nonnunquam difficile est judicare, certone constet de quasi-domicilio, haud pauca matrimonia fuerunt objecta periculo ne nulla essent : multa quoque, sive inscitia hominum sive fraude, illegitima prorsus atque irrita deprehensa sunt.

Hæc dudum deplorata, eo crebrius accidere nostra ætate videmus, quo facilius ac celerius commeatus cum gentibus, etiam disjunctissimis, perficiuntur. Quamobrem sapientibus viris ac doctissimis visum est expedire ut mutatio aliqua induceretur in jure circa formam celebrandi connubii. Complures etiam sacrorum Antistites omni ex parte terrarum, præsertim e celebrioribus civitatibus, ubi gravior appareret necessitas, supplices ad id preces Apostolicæ Sedi admoverunt.

Flagitatum simul est ab Episcopis, tum Europæ plerisque, tum aliarum regionum, ut incommodis occurreretur, quæ ex sponsalibus, idest mutuis promissionibus futuri matrimonii privatim initis, derivantur. Docuit enim

experientia satis, quæ secum pericula ferant ejusmodi sponsalia : primum quidem incitamenta peccandi causamque cur inexpertæ puellæ decipiantur ; postea dissidia ac lites inextricabiles.

His rerum adjunctis permotus Sanctissimus D. N. Pius PP. X, pro ea quam gerit omnium Ecclesiarum sollicitudine, cupiens ad memorata damna et pericula removenda temperatione aliqua uti, commisit S. Congregationi Concilii ut de hac re videret, et quæ opportuna æstimaret, S. Sedi proponeret.

Voluit etiam votum audire Consilii ad jus canonicum in unum redigendum constituti, nec non Eminentissimorum Cardinalium qui pro eodem codice parando speciali commissione delecti sunt : a quibus, quemadmodum et a S. Congregatione Concilii, conventus in eum finem sæpius habiti sunt. Omnium autem sententiis obtentis, Sanctissimus Dominus S. Congregationi Concilii mandavit, ut decretum ederet quo leges, a Se ex certa scientia et matura deliberatione probatæ, continerentur, quibus sponsalium et matrimonii disciplina in posterum regeretur, eorumque celebratio expedita, certa atque ordinata fieret.

In executionem itaque Apostolici mandati, S. Concilii Congregatio præsentibus litteris constituit atque decernit ea quæ sequuntur.

De sponsalibus.

I. — Ea tantum sponsalia habentur valida et canonicos sortiuntur effectus, quæ contracta fuerint per scripturam subsignatam a partibus et vel a parocho, aut a loci Ordinario, vel saltem a duobus testibus.

Quod si utraque vel alterutra pars scribere nesciat, id in ipsa scriptura adnotetur ; et alius testis addatur, qui cum parocho, aut loci Ordinario, vel duobus testibus, de quibus suprà, scripturam subsignet.

II. — Nomine parochi hic et in sequentibus articulis venit non solum qui legitime præest parœciæ canonice erectæ ; sed in regionibus, ubi parœciæ canonice erectæ non sunt, etiam sacerdos cui in aliquo definito territorio cura animarum legitime commissa est, et parocho æquiparatur ; et in missionibus, ubi territoria necdum perfecte divisa sunt, omnis sacerdos a missionis Moderatore ad animarum curam in aliqua statione universaliter deputatus.

De matrimonio.

III. — Ea tantum matrimonia valida sunt, quæ contrahuntur coram parocho vel loci Ordinario vel sacerdote ab alterutro delegato, et duobus saltem testibus, juxta tamen regulas in sequentibus articulis expressas, et salvis exceptionibus quæ infra n. VII et VIII ponuntur.

IV. — Parochus et loci Ordinarius *valide* matrimonio adsistunt,

§ 1° a die tantummodo adeptæ possessionis beneficii vel initi officii, nisi publico decreto nominatim fuerint excommunicati vel ab officio suspensi ;

§ 2° intra limites dumtaxat sui territorii : in quo matrimoniis nedum suorum subditorum, sed etiam non subditorum valide adsistunt ;

§ 3° dummodo invitati ac rogati, et neque vi neque metu gravi constricti requirant excipiantque contrahentium consensum.

V. — *Licite* autem adsistunt,

§ 1° constito sibi legitime de libero statu contrahentium, servatis de jure servandis ;

§ 2° constito insuper de domicilio, vel saltem de menstrua commoratione alterutrius contrahentis in loco matrimonii ;

§ 3° quodsi deficiat, ut parochus et loci Ordinarius licite matrimonio adsint, indigent licentia parochi vel Ordinarii proprii alterutrius contrahentis, nisi gravis intercedat necessitas, quae ab ea excuset.

§ 4° Quoad *vagos*, extra casum necessitatis, parocho ne liceat eorum matrimoniis adsistere, nisi, re ad Ordinarium vel ad sacerdotem ab eo delegatum delata, licentiam adsistendi impetraverit.

§ 5° In quolibet autem casu pro regula habeatur ut matrimonium coram sponsæ parocho celebretur, nisi aliqua justa causa excuset.

VI. — Parochus et loci Ordinarius licentiam concedere possunt alii sacerdoti determinato ac certo, ut matrimoniis intra limites sui territorii adsistat.

Delegatus autem, ut valide et licite adsistat, servare tenetur limites mandati, et regulas pro parocho et loci Ordinario n. IV et V superius statutas.

VII. — Imminente mortis periculo, ubi parochus, vel loci Ordinarius, vel sacerdos ab alterutro delegatus, haberi nequeat, ad consulendum conscientiae et (si casus ferat) legimationi prolis, matrimonium contrahi valide ac licite potest coram quolibet sacerdote et duobus testibus.

VIII. — Si contingat ut in aliqua regione parochus locive Ordinarius, aut sacerdos ab eis delegatus, coram quo matrimonium celebrari queat, haberi non possit, eaque rerum conditio a mense jam perseveret, matrimonium valide ac licite iniri potest emisso a sponsis formali consensu coram duobus testibus.

IX. — § 1°. Celebrato matrimonio, parochus, vel qui ejus vices gerit, statim describat in libro matrimoniorum nomina conjugum ac testium, locum et diem celebrati matrimonii, atque alia, juxta modum in libris ritualibus vel a proprio Ordinario præscriptum ; idque licet alius sacerdos vel a se vel ab Ordinario delegatus matrimonio adstiterit.

§ 2°. Præterea parochus in libro quoque baptizatorum adnotet, conjugem tali die in sua parochia matrimonium contraxisse. Quod si conjux alibi

baptizatus fuerit, matrimonii parochus notitiam iniți contractus ad parochum baptismi sive per se, sive par curiam episcopalem transmittat, ut matrimonium in baptismi librum referatur.

§ 3°. Quoties matrimonium ad normam n. VII aut VIII contrahitur, sacerdos in priori casu, testes in altero, tenentur in solidum cum contrahentibus curare, ut initum conjugium in præscriptis libris quam primum adnotetur.

X. — Parochi qui heic hactenus præscripta violaverint, ab Ordinariis pro modo et gravitate culpæ puniantur. Et insuper si alicujus matrimonio adstiterint contra præscriptum § 2[i] et 3[i] num. V, emolumenta *stolæ* sua ne faciant, sed proprio contrahentium parocho remittant.

XI. — § 1°. Statutis superius legibus tenentur omnes in catholica Ecclesia baptizati et ad eam ex hæresi aut schismate conversi (licet sive hi, sive illi ab eadem postea defecerint), quoties inter se sponsalia vel matrimonium ineant.

§ 2°. Vigent quoque pro iisdem de quibus supra catholicis, si cum acatholicis sive baptizatis sive non baptizatis, etiam post obtentam dispensationem ab impedimento mixtæ religionis vel disparitatis cultus, sponsalia vel matrimonium contrahunt : nisi pro aliquo particulari loco aut regione aliter a S. Sede sit statutum.

§ 3°. Acatholici sive baptizati sive non baptizati, si inter se contrahunt, nullibi ligantur ad catholicam sponsalium vel matrimonii formam servandam.

Præsens decretum legitime publicatum et promulgatum habeatur per ejus transmissionem ad locorum Ordinarios : et quæ in eo disposita sunt ubique vim legis habere incipiant a die solemni Paschæ Resurrectionis D. N. J. C. proximi anni 1908.

Interim vero omnes locorum Ordinarii curent hoc decretum quamprimum in vulgus edi, et in singulis suarum diœcesium parochialibus ecclesiis explicari, ut ab omnibus rite cognoscatur.

Praesentibus valituris de mandato speciali SS[mi] D. N. Pii PP. X, contrariis quibuslibet etiam peculiari mentione dignis minime obstantibus.

Datum Romæ die 2[a] mensis Augusti anni 1907.

† Vincentius Card. Ep. Prænest., *Præfectus.*

C. De Lai, *Secretarius.*

Decree concerning Sponsalia and Matrimony (1).

Issued by the Sacred Congregation of the Council by the Order and with the Authority of Our Father Pope Pius X.

The Council of Trent, *cap. I., Sess. XXIV, de reform., matrim.*, made prudent provision against the rash celebration of clandestine marriages, which the Church of God for most just reasons has always detested and forbidden, by decreeing : « Those who otherwise than in the presence of the parish-priest himself or of another priest acting with the licence of the parish-priest or of the Ordinary, and in the presence of two or three witnesses, shall attempt to contract matrimony, the Holy Synod renders them altogether incapable of contracting marriage thus, and decrees that contracts of this kind are null and void ».

But as the same Sacred Council prescribed that the said Decree should be published in all the parishes and was not to have force except in those places in which it had been promulgated, it has happened that many places in which the publication has not been made have been deprived of the benefit of the Tridentine law, and are still without it, and continue to be subject to the doubts and inconveniences of the old discipline.

Nor has all difficulty been removed in those places where the new law has been in force. For often there has been grave doubt in deciding as to the person of the parish-priest before whom a marriage is to be celebrated. The canonical discipline did indeed decide that he is to be regarded as the parish priest in whose parish one or the other of the contracting parties has his or her domicile or quasi-domicile. But as it is sometimes difficult to judge whether a quasi-domicile really exists in a specified case, not a few marriages were exposed to the danger of nullity ; many too, either owing to ignorance or fraud, have been found to be quite illegitimate and void.

These deplorable results have been seen to happen more frequently in our own time on account of the increased facility and celerity of intercommunication between the different countries, even those more widely separated. It has therefore seemed expedient to wise and learned men to introduce some change into the law regulating the form of the celebration of marriage, and a great many Bishops in all parts of the world, but especially in the more populous states where the necessity appears more urgent, have petitioned the Holy See to this end.

It has been asked also by very many Bishops in Europe, as well as by others in various regions, that provision should be made to prevent the inconveniences arising from *sponsalia*, that is mutual promises of marriage

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1. Authorised Translation, published by Burns and Oates, Ltd., London 1908.

privately entered upon. For experience has sufficiently shown the many dangers of such *sponsalia*, first as being an incitement to sin and causing the deception of inexperienced girls, and afterwards giving rise to inextricable dissensions and disputes.

Influenced by these circumstances, our Holy Father Pope Pius X, desiring, in the solicitude he bears for all the churches, to introduce some modifications with the object of removing these drawbacks and dangers, committed to the Sacred Congregation of the Council the task of examining into the matter and of proposing to himself the measures it should deem opportune.

He was pleased also to have the opinion of the commission appointed for the codification of Canon Law, as well as of the Eminent Cardinals chosen on this special commission for the preparation of the new code, by whom as well as by the S. Congregation of the Council, frequent meetings have been held for this purpose. The opinions of all having been taken, His Holiness ordered the Sacred Congregation of the Council to issue a decree containing the laws approved by himself on sure knowledge and after mature deliberation by which the discipline regarding *sponsalia* and marriage is to be regulated for the future and the celebration of them carried out in a sure and orderly manner.

In execution, therefore, of the Apostolic mandate the S. Congregation of the Council by these letters lays down and decrees as follows :

Concerning Sponsalia.

I. Only those are considered valid and produce canonical effects which have been contracted in writing signed by both the parties and by either the parish-priest or the Ordinary of the place, or at least by two witnesses.

In case one or both the parties be unable to write, this fact is to be noted in the document and another witness is to be added who will sign the writing as above, with the parish-priest or the Ordinary of the place or the two witnesses.

II. Here and in the following articles, by parish-priest is to be understood not only a priest legitimately presiding over a parish canonically erected, but in regions where parishes are not canonically erected the priest to whom the care of souls has been legitimately entrusted in any specified district and who is equivalent to a parish-priest ; and in missions where the territory has not yet been perfectly divided, every priest generally deputed by the superior of the mission for the care of souls in any station.

Concerning Marriage.

III. Only those marriages are valid which are contracted before the parish-priest or the Ordinary of the place or a priest delegated by either of

these, and at least two witnesses, according to the rules laid down in the following articles, and saving the exceptions mentioned under VII. and VIII.

IV. The parish-priest and the Ordinary of the place validly assist at a marriage :

i) only from the day they have taken possession of the benefice or entered upon their office, unless they have been by a public decree excommunicated by name or suspended from office ;

ii) only within the limits of their territory : within which they assist validly at marriages not only of their own subjects, but also of those not subject to them ;

iii) provided when invited and asked, and not compelled by violence or by grave fear, they demand and receive the consent of the contracting parties.

V. They assist licitly :

i) when they have legitimately ascertained the free state of the contracting parties, having duly complied with the conditions laid down by the law ;

ii) when they have ascertained that one of the contracting parties has a domicile or at least has lived for a month in the place where the marriage takes place ;

iii) if this condition be lacking, the parish-priest and the Ordinary of the place, to assist licitly at a marriage, require the permission of the parish-priest or the Ordinary of one of the contracting parties, unless it be a case of grave necessity which excuses from this permission ;

iv) concerning persons without fixed abode *(vagos)*, except in case of necessity it is not lawful for a parish priest to assist at their marriage, until they report the matter to the Ordinary or to a priest delegated by him and obtain permission to assist ;

v) in every case let it be held as the rule that the marriage is to be celebrated before the parish-priest of the bride, unless some just cause excuses from this.

VI. The parish-priest and the Ordinary of the place may grant permission to another priest, specified and certain, to assist at marriages within the limits of their district.

The delegated priest, in order to assist validly and licitly, is bound to observe the limits of his mandate and the rules laid down above, in IV. and V., for the parish-priest and the Ordinary of the place.

VII. When danger of death is imminent and where the parish-priest or the Ordinary of the place or a priest delegated by either of these cannot be had, in order to provide for the relief of conscience and (should the case

require it) for the legitimation of offspring, marriage may be contracted validly and licitly before any priest and two witnesses.

VIII. Should it happen that in any region the parish-priest or the Ordinary of the place or a priest delegated by either of them, before whom marriage can be celebrated, is not to be had, and that this condition of things has lasted for a month, marriage may be validly and licitly entered upon by the formal declaration of consent made by the spouses in the presence of two witnesses.

IX. i) After the celebration of a marriage the parish-priest, or he who takes his place, is to write at once in the book of marriages the names of the couple and of the witnesses, the place and the day of the celebration of the marriage, and the other details, according to the method prescribed in the ritual books or by the Ordinary ; and this even when another priest delegated either by the parish-priest himself or by the Ordinary has assisted at the marriage.

ii) Moreover, the parish-priest is to note also in the book of baptisms, that the married person contracted marriage on such a day in his parish. If the married person has been baptised elsewhere the parish-priest who has assisted at the marriage is to transmit, either directly or through the episcopal curia, the announcement of the marriage that has taken place, to the parish-priest of the place where the person was baptised, in order that the marriage may be inscribed in the book of baptisms.

iii) Whenever a marriage is contracted in the manner described in VII. and VIII., the priest in the former case, the witnesses in the latter are bound conjointly with the contracting parties to provide that the marriage be inscribed as soon as possible in the prescribed books.

X. Parish-priests who violate the rules thus far laid down are to be punished by their Ordinaries according to the nature and gravity of their transgression. Moreover,if they assist at the marriage of anybody in violation of the rules laid down in ii) and iii) of No. V. they are not to appropriate the stole-fees, but must remit them to the parish-priest of the contracting parties.

XI. i) The above laws are binding on all persons baptised in the Catholic Church and on those who have been converted to it from heresy or schism (even when either the latter or the former have fallen away afterwards from the Church) whenever they contract sponsalia or marriage with another.

ii) The same laws are binding also on the same Catholics as above, if they contract sponsalia or marriage with non-catholics, baptised or unbaptised, even after a dispensation has been obtained from the impediment *mixtae religionis* or *disparitatis cultus ;* unless the Holy See decree otherwise for some particular place or region.

iii) Non-catholics, whether baptised or unbaptised, who contract among themselves, are nowhere bound to observe the Catholic form of *sponsalia* or marriage.

The present decree is to be held as legitimately published and promulgated by its transmission to the Ordinaries, and its provisions begin to have the force of law from the solemn feast of the Resurrection of Our Lord Jesus Christ, next year 1908.

Meanwhile let all the Ordinaries of places see that this decree be made public as soon as possible, and explained in the different parochial churches of their dioceses in order that it may be known to all.

These presents are to have force by the special order of our Most Holy Father Pope Pius X., all things to the contrary, even those worthy of special mention, notwithstanding.

Given at Rome on the 2nd day of August in the year 1907.

VINCENT, Card. Bishop of Palestrina, *Prefect.*
C. DE LAI, *Secretary.*

II. Subsequent Decisions.

1° DECRETUM S. C. C. 1 FEBR. 1908 *(Romana et aliarum)*.

In plenariis comitiis a S. Congregatione Concilii habitis die 1 Februarii 1908, sequentia proposita fuerunt dirimenda dubia, nimirum :

I. An decreto *Ne Temere* adstringantur etiam catholici ritus orientalis. — Et quatenus negative :

II. Utrum ad eosdem decretum extendere expediat. — Et quatenus saltem pro aliquo loco decretum non fuerit extensum :

III. Utrum validum sit matrimonium contractum a catholico ritus latini cum catholico ritus orientalis, non servata forma ab eodem decreto statuta.

IV. An sub art. XI, § 2, in exceptione enunciata illis verbis « *nisi pro aliquo particulari loco aut regione aliter a S. Sede sit statutum* » comprehendatur tantummodo Constitutio Provida Pii PP. X ; an potius comprehendatur quoque Constitutio Benedictina et cetera ejusmodi indulta impedimentum clandestinitatis respicientia.

V. Num in imperio Germaniæ catholici, qui ad sectam hæreticam vel schismaticam transierunt, vel conversi ad fidem catholicam ab ea postea defecerunt, etiam in juvenili vel infantili ætate, ad valide cum persona catholica contrahendum adhibere debeant formam in decreto *Ne Temere* statutam, ita scilicet ut contrahere debeant coram parocho et duobus saltem testibus. — Et quatenus affirmative :

VI. An, attentis peculiaribus circumstantiis in imperio Germaniæ existentibus, opportuna dispensatione provideri oporteat.

VII. Ubinam et quomodo cappellani castrenses, vel parochi nullum absolute territorium nec cumulative cum alio parocho habentes, at jurisdictionem directe exercentes in personas aut familias, adeo ut has personas sequantur quocumque se conferant, valide matrimoniis suorum subditorum adsistere valeant.

VIII. Ubinam et quomodo parochi qui, territorium exclusive proprium non habentes, cumulative territorium cum alio vel aliis parochis retinent, matrimoniis adsistere valeant.

IX. Ubinam et quomodo parochus, qui in territorio aliis parochis assignato nonnullas personas vel familias sibi subditas habet, matrimoniis adsistere valeat.

X. Num cappellani seu rectores piorum cujusvis generis locorum, a parochiali jurisdictione exemptorum, adsistere valide possint matrimoniis absque parochi vel Ordinarii delegatione.

XI. An a decreto *Ne Temere* abolita sit lex vel consuetudo in nonnullis diœcesibus vigens, vi cujus a Curia episcopali peragenda sunt acta, quibus constet de statu libero contrahentium et dein venia fiat parochis adsistendi matrimoniis.

XII. An et quousque expediat prorogare executionem decreti *Ne Temere* pro nonnullis locis juxta Ordinariorum petitiones.

Et E^mi^ Patres ad hujusmodi dubia ita respondendum censuerunt :

Ad I. Negative.

Ad II. Ad S. Congregationem de Propaganda Fide.

Ad III. Dilata, exquiratur votum duorum Consultorum, qui præ oculis habeant leges hac de re vigentes apud Orientales.

Ad IV. Comprehendi tantummodo Constitutionem *Provida* ; non autem comprehendi alia quæcumque decreta, facto verbo cum SS^mo^ ; et ad mentem.

Ad V. Affirmative.

Ad VI. Negative, ideoque servetur decretum *Ne Temere*.

Ad VII. Quoad cappellanos castrenses aliosque parochos, de quibus in dubio, nihil esse immutatum.

Ad VIII. Affirmative in territorio cumulative habito.

Ad IX. Affirmative, quoad suos subditos tantum, ubique in dicto territorio, facto verbo cum SS^mo^.

Ad X. Affirmative pro personis sibi creditis, in loco tamen ubi jurisdictionem exercent, dummodo constet ipsis commissam fuisse plenam potestatem parochialem.

Ad XI. Servetur solitum.

Ad XII. Ad E^mum^ Præfectum cum SS^mo^.

Die vero quarta dicti mensis et anni SS^mus^ D^nus^ Noster Pius PP. X, audita relatione infrascripti Præfecti S. C. Concilii, supra relatas resolutiones ac

declarationes ratas habere et confirmare benigne dignatus est easque vulgari mandavit, contrariis quibuscumque non obstantibus.

† Vincentius Card., Ep. Prænest., *Præfectus.*
B. Pompili, *Secretarius.*

2° Decretum S. C. C. 28 Martii 1908 (*Romana et aliarum*).

Die 28 Martii 1908 proposita sunt coram S. Congr. Concilii sequentia dubia :

I. Utrum validum sit matrimonium contractum a catholica ritus latini cum catholico ritus orientalis, non servata forma a Decreto *Ne Temere* statuta.

II. An in art. XI § 2 ejusdem decreti sub nomine acatholicorum comprehendantur etiam schismatici et hæretici rituum Orientalium.

III. Num exceptio, per Const. *Provida* in Germania inducta, censenda sit uti mere localis, aut etiam personalis.

IV. An Ordinarii et parochi nedum explicite sed etiam implicite « invitati ac rogati » dummodo tamen « *neque vi neque metu gravi constricti requirant excipiantque contrahentium consensum* » valide matrimoniis assistere possint.

V. An ad licitam matrimonii celebrationem habenda sit ratio dumtaxat menstruæ commorationis, non autem quasi-domicilii.

VI. Utrum sponsalia, præterquam coram Ordinario aut parocho, celebrari valeant etiam coram ab alterutro delegato.

VII. Utrum sponsalia celebrari debeant dumtaxat coram Ordinario vel parocho domicilii aut menstruæ commorationis, an possint etiam celebrari coram quolibet Ordinario aut parocho.

E^mi^ Patres responderunt : Ad I^m^, Negative. Ad II^m^, Affirmative. Ad III^m^ Exceptionem valere tantummodo pro natis in Germania ibidem matrimonium contrahentibus, facto verbo cum SS^mo^. Ad IV^m^, Affirmative. Ad V^m^, Affirmative ad primam partem, negative ad secundam. Ad VI^m^, Negative. Ad VII^m^, Posse celebrari coram quolibet Ordinario aut parocho, dummodo intra limites territorii ejusdem Ordinarii vel parochi.

3° Decretum S. C. C. 27 Julii 1908.

I. Utrum ad valida ineunda sponsalia partes teneantur subsignare scripturam unico contextu cum parocho seu Ordinario, aut cum duobus testibus ; an potius sufficiat ut scriptura, ab una parte cum parocho vel cum duobus testibus subsignata, remittatur ad alteram partem quæ vicissim cum parocho vel cum duobus testibus subscribat.

II. An ad sponsalium validitatem in scriptura sit apponenda data, seu adscriptio diei, mensis et anni.

III. An vi decreti *Ne Temere*, etiam ad matrimonia mixta valide contrahenda, ab Ordinario vel a parocho exquirendus et excipiendus sit contrahentium consensus.

IV. Utrum ad valide et licite matrimoniis assistendum, ad tramitem art. VI Decreti, requiratur semper delegatio specialis, an vero sufficiat generalis.

V. An in locis dissitis, ad quæ missionarius singulis mensibus non venit, — in quibus tamen si peteretur haberi posset, et vel ad eum aut ad alium missionarium, qui sit parochus in sensu decreti, absque gravi incommodo possent accedere sponsi, — matrimonia contracta sine missionarii seu parochi præsentia retinenda sint uti valida.

VI. Utrum ratione momentanei, inopinati et fidelibus prorsus incogniti transitus per aliquem locum, a quo jam a mense missionarius abest, interrumpi dicenda sit illa rerum condicio de qua art. VIII decreti.

VII. An et quomodo annuendum sit petitionibus Ordinariorum Sinensium, præsertim : 1° quod ad sponsalium celebrationem ; 2° quod ad matrimonia ex dispensatione contracta a baptizatis cum non baptizatis ; 3° quod ad matrimonia contracta inter catholicos qui sub paganorum potestate sunt constituti.

VIII. Utrum subditi diœcesis Damænsis, in diœcesi tamen Bombayensi commorantes, et e converso subditi diœcesis Bombayensis degentes in diœcesi Damænsi, ut validum et licitum ineant matrimonium, teneantur se sistere dumtaxat coram parocho personali, vel possint etiam coram parocho territorii.

IX. An et quomodo providere expediat casui quo parochi a lege civili graviter prohibeantur quominus matrimoniis fidelium assistant nisi præmissa cæremonia civili, quæ præmitti nequeat, et tamen pro animarum salute omnino urgeat matrimonii celebratio.

Et Sacra Congregatio Concilii, in plenario concessu habito, die 27 Julii 1908, in Palatio Vaticano, ad præposita dubia respondit :

Ad I. Affirmative ad primam partem, negative ad secundam.

Ad II. Affirmative.

Ad III. Affirmative, servatis ad liceitatem, quod ad reliqua, præscriptionibus et instructionibus S. Sedis.

Ad IV. Quod ad delegationem nihil esse immutatum, excepta necessitate eam faciendi sacerdoti determinato et certo, et restrictam ad territorium delegantis.

Ad V. Negative.

Ad VI. Negative.

Ad VII. Quod ad primum, negative. Quod ad secundum et tertium concedendam esse Ordinariis facultatem dispensandi a forma substantiali pro

casibus tantum veræ necessitatis, cum potestate hanc facultatem etiam habitualiter subdelegandi missionum rectoribus.

Ad VIII. Dilata.

Ad IX. Non esse interloquendum.

4° Decretum S. C. de Sacram. 18 Junii 1909 *(Romana et aliarum)*.

In plenariis comitiis a S. Congregatione de disciplina Sacramentorum habitis, die 18 mensis Junii anno 1909, sequentia proposita fuerunt dirimenda dubia, nimirum :

I. Num responsum S. Congregationis Concilii diei 28 Martii 1908 ad II : « Exceptionem valere tantummodo pro natis in Germania ibique matrimonium contrahentibus », ita sit intelligendum, ut in quovis casu ambo conjuges debeant esse nati in Germania, seu respective in regno Hungariæ.

II. An post extensionem Constitutionis *Provida* ad regnum Hungariæ, Germaniam inter et Hungariam, quoad validitatem clandestinorum mixtorum matrimoniorum, reciproca relatio habeatur, ita ut duo conjuges nati ambo in Germania matrimonium mixtum clandestinum valide ineant etiam in regno Hungariæ, et, viceversa, nati ambo in regno Hungariæ valide contrahant clandestino quoque modo in Germania.

III. Num saltem natus in Germania cum nata in regno Hungariæ mixtum matrimonium valide ineat sive in Germania sive in regno Hungariæ.

Et Emi Patres ad hujusmodi dubia ita respondendum censuerunt :

Ad I. Affirmative.

Ad II. Negative.

Ad III. Negative.

5° Decretum S. C. de Sacramentis 12 Martii 1910.

In plenariis comitiis a S. Congregatione de disciplina Sacramentorum habitis, die 12 martii 1910, sequentia proposita fuerint dirimenda dubia, nimirum :

I. Quid intelligendum sit nomine « regionis »,seu in qua distantia debeant versari contrahentes a loco in quo est sacerdos competens ad assistendum matrimonio, ut hoc possit valide et licite iniri coram solis testibus ad normam art. VIII decr. « *Ne Temere* ».

II. Accidit non raro ut ob sacerdotum inopiam plures parœciæ ab uno tantum parocho regantur, qui easdem omnes singulis mensibus invisere nequit. Sunt pariter quædam amplæ parœciæ, vicos etiam cum sacello publico valde dissitos continentes, qui infra mensem, tum ob viarum asperitatem, tum ob fluminum impetum lustrari a parocho nequeunt omnino, nec parochus a fidelibus adiri potest. Quæritur : *a/* Possintne fideles parœciarum in primo casu, elapso mense quin parochus advenerit, valide ac

licite matrimonium contrahere coram duobus testibus tantum, juxta art. VIII ; *b*/ Quilibet vicus in secundo casu possitne tamquam « regio » haberi, ita ut ibi degentes facultate præfati art. VIII uti valeant.

III. Utrum valide matrimonium coram solis testibus ineat qui in « regionem », de qua art. VIII *in fraudem legis* se conferat.

IV. An possint adhiberi ut testes mali christiani atque adeo pagani in ordine ad observandas præscriptiones art. II, III, VII et VIII.

V. Quoad menstruam commorationem et vagos quæritur : *a*/ Utrum commoratio menstrua, de qua in art. V, § 2, sit accipienda *sensu relativo*, i. e. quoad eos qui alibi habent domicilium aut quasi-domicilium, an *sensu absoluto*, seu quoad illos qui nullibi prædictum domicilium aut quasi-domicilium habent ; *b*/ Utrum parochus vel Ordinarius proprius, de quo eodem art. V, § 3, sit parochus vel Ordinarius commorationis menstruæ sensu absoluto acceptæ ; *c*/ Utrum nomine vagorum, de quibus art. V, § 4, ii omnes veniant qui destituuntur domicilio et quasi-domicilio, an ii tantum qui, domicilio et quasi-domicilio destituti, præterea nullibi habent parochum vel Ordinarium commoratione saltem menstrua acquisitum.

VI. Accidit ut parochorum coadjutores ab Episcopis nominentur, et quidem ex jure particulari facultate assistendi conjugiis non sint instructi ; tamen usuvenit ut, ab incepto officii exercitio, parochis non contradicentibus, sed irrequisita eorum licentia, matrimoniis adsistant, in libris etiam matrimoniorum adhibentes solam sui ipsorum subscriptionem ; imo præsertim in majoribus parœciis semper vel fere semper matrimoniis adsistant. Quæritur in casu : *a*/ An matrimonia coram coadjutoribus hucusque inita, tacentibus parochis, sint valida ; *b*/ Quatenus affirmative, an licite coadjutores se gerant in assistentia connubiis praestanda ab incepto officii exercitio, absque expressa parochorum delegatione ; *c*/ Utrum tolerari possit mos ut coadjutores omnibus vel fere omnibus matrimoniis in parœcia adsistant, an potius parochi urgeri debeant ad hanc adsistentiam ut plurimum et ordinarie per seipsos explendam, nisi legitima et gravi causa, onerata ipsorum conscientia, impediti fuerint, quo in casu deputationem coadjutoribus conferant et ita solitis verbis connubia in libris matrimoniorum describantur.

VII. Utrum per art. I decreti maneat abrogatum jus speciale ante illud decretum in Hispania vigens, et ad Americam Latinam extensum, vi cujus ad valorem sponsalium requirebatur scriptura publica *a notario* subscripta.

VIII. Utrum Ecclesiæ regulares exemptæ ad tenorem decreti existimari possint et valeant tamquam territorium parochi seu Ordinarii, in quorum territoriali districtu sunt sitæ, ad effectum adsistentiæ matrimonii.

IX. An et quomodo annuendum sit petitionibus quorundam Ordinariorum, nimirum : 1° Episcopi Rosensis postulantis dispensationem ab obligatione imposita per art. IX, § 2, adnotandi in libro baptizatorum conjuges tali die in sua parœcia matrimonium contraxisse ; 2° Vicarii Apostolici

Kiam-Si Orientalis postulantis dispensationem non solum ab obligatione adnotandi matrimonium contractum in libro baptizatorum, sed etiam in libro matrimoniorum ; 3° quorundam Ordinariorum Sinensium qui quærunt : Utrum responsum S. C. C. diei 27 Julii 1908, ad VII, restringatur ad solos duos casus tunc in quæsito proposito ; et, *quatenus affirmative*, postulant ut responsum extendatur ad alios casus veræ necessitatis ; 4° Episcopi Mangalorensis qui postulat ut sibi facultas detur permittendi ut matrimonium celebratum in libro matrimoniorum describi possit a Sacerdote qui ex delegatione parochi matrimonio adstitit, quando parochus sit absens.

Et E^mi^ Patres ad hujusmodi dubia ita respondendum censuerunt :

R. Ad 1^m^. Matrimonium potest valide et licite contrahi coram solis testibus sine præsentia Sacerdotis competentis ad assistendum semper ac, elapso jam mense, Sacerdos competens absque gravi incommodo haberi vel adiri nequeat.

Ad 2^m^. Provisum in primo.

Ad 3^m^. Affirmative.

Ad 4^m^. Quoad qualitates testium a decreto « *Ne Temere* » nihil esse immutatum.

Quoad 5^m^. Ad *a* et *b* : Provisum per responsum ad quintum datum a S. C. Concilii die 28 Martii 1908.

Ad *c* : Nomine vagorum, de quibus art. V, § 4, veniunt omnes et soli qui nullibi habent parochum vel Ordinarium proprium ratione domicilii vel menstruæ commorationis.

Quoad 6^m^. Ad *a* : acquiescant, facto verbo cum SS^mo^ ; ad *b* : serventur de jure servanda ; ad *c* : quoad assistentiam matrimoniis a parochis personaliter præstandam, Archiepiscopus pro suo jure urgeat si quæ sunt de ea re leges Concilii Provincialis. Quoad descriptionem matrimonii celebrati servetur art. IX Decreti « *Ne Temere* », et præscriptum Ritualis Romani.

Ad 7^m^. Affirmative.

Ad 8^m^. Affirmative.

Quoad 9^m^. Ad 1^m^ : Non expedire et ad mentem. Mens est, ut Ordinarius aliique ipsius cooperatores quantum in Domino possunt, satagant illam perniciosam superstitionem ab animis fidelium avertere, qua ab usurpandis Sanctorum nominibus in baptismo receptis deterrentur. Doceant ipsos frequenter, idcirco nomina eis imponi Sanctorum, ut eorum exemplis ad pie vivendum excitentur et patrociniis protegantur. Parochis vero aliisque animarum curæ præpositis sacerdotibus commendent, ut quamdiu illa perniciosa superstitio eradicari non possit, omni qua valeant, diligentia libros parochiales conscribant, etiam adhibita opera aliorum, quorum industria ea in re juvari posse credant. Quodsi in casu particulari verum nomen conjugati scire non poterunt, stante morali impossibilitate legem observandi, ea non obligantur.

Ad 2m : Non expedire quoad utrumque et ad mentem. Mens est : Ordinarios curare debere, ut a Missionariis regesta celebratorum matrimoniorum diligenter conficiantur et conserventur, eisque pro suo prudenti arbitrio præscribere cautiones ad vitanda incommoda exposita, adhibitis etiam, si opus fuerit, signis conventionalibus.

Ad 3m. Quoad 1m : Negative ; quoad 2m : Provisum in primo.

Ad 4m. Pro gratia prudenti arbitrio et conscientiæ Episcopi.

Die autem 13 ejusdem mensis et anni Sanctissimus Dominus Noster, audita relatione infrascripti Secretarii, supra relatas resolutiones ratas habere et approbare dignatus est.

D. Card. Ferrata, *Præfectus.*

L. † S. Ph. Giustini, *Secretarius.*

6° Instructio S. C. de Sacram. ad Ordinarios circa statum liberum ac denunciationem initi matrimonii.

Perlatum haud semel est ad hanc S. Congregationem de disciplina Sacramentorum, in quibusdam regionibus parochos matrimoniis adsistere, præsertim advenarum, non comprobato rite ac legitime statu libero contrahentium, ejusque rei causa non defuisse qui alteras nuptias attentare sint ausi.

Haud pauci præterea Ordinarii conquesti sunt, initorum notitiam connubiorum, quæ vi decreti, *Ne Temere*, editi a S. C. Concilii die II mensis Augusti anno MDCCCCVII, transmittenda est ad parochum baptismi conjugum,sæpe omni fidei testimonio esse destitutam debitisque indiciis carere.

Ad hæc incommoda removenda Emi Patres hujus S. Congregationis in generali conventu habito in ædibus Vaticanis die VII mensis Februarii MDCCCCXI, præscribenda censuerunt ea quæ sequuntur :

I. In memoriam redigatur parochorum haud licere ipsis adesse matrimonio, *nisi constito sibi legitime de libero statu contrahentium, servatis de jure servandis* (Cfr. Decr. *Ne Temere*, n. V, § 2) ; iidemque præsertim moneantur ne omittant baptismi testimonium a contrahentibus exigere, si hic alia in parœcia fuerit illis collatus.

II. Ut autem quæ n. IX, § 2 memorati Decreti præscripta sunt rite serventur, celebrati matrimonii denuntiatio, ad baptismi parochum transmittenda, conjugum eorumque parentum nomina et agnomina descripta secumferat, ætatem contrahentium, locum diemque nuptiarum, testium qui interfuerunt nomina et agnomina, habeatque parochi subscriptum nomen cum adjecto parochiali sigillo. Inscriptio autem accurata indicet parœciam, diœcesim, oppidum seu locum baptismi conjugum, et ea quæ ad scripta per publicos portitores tuto transmittenda pertinent.

III. Si forte accidat ut, adhibitis etiam cautelis, de quibus n. I, baptismi

parochus, in recipienda denuntiatione matrimonii comperiat alterutrum contrahentium aliis nuptiis jam esse alligatum, rem quantocius significabit parocho attentati matrimonii.

IV. Ordinarii sedulo advigilent ut hæc præscripta religiose serventur, et transgressores, si quos invenerint, curent ad officium revocare, adhibitis etiam, ubi sit opus, canonicis pœnis.

Ex Ædibus ejusdem S. C. die 6 Martii 1911.

D. Card. Ferrata, *Præfectus.*
Ph. Giustini, *Secretarius.*

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For further, but less important documents concerning the Decree *Ne Temere*, we refer the reader to the *Collat. Brug.*, t. XIV, p. 362, 490, 561 s. ; t. XV, p. 432 ss. ; t. XVI, p. 432 s. and t. XVII, p. 561 ss. There will be found : a/ the text of the decree of the S. C. C., of 2 March 1908, on the interpretation of Article IV of the Decree *Ne Temere* ; b/ the text of the decree of the same Congregation, of 8 July 1908, deciding that the exception made in Art. XI, § 2 of the Decree *Ne Temere* is not applicable to the Russian Empire ; c/ the text of the decree of the S. C. de Sacr., of 27 Feb. 1909, extending to the Kingdom of Hungary the privilege granted for the German Empire ; d/ the text of the decree of the same Congregation, dated 2 June 1910, answering a doubt proposed on 27 July 1908, under 8, (see above, n° 64, in the note) as to the competence of the *personal* parish priest in the East Indies ; this competence is declared to be *exclusive*, so that the marriage can take place only in the presence of the personal parish priest, and not before the parish priest of the place ; e/ the text of the decree of the C. S. O. of 31 March 1911, (A. A. S., III, p. 163 s.) in answer to a doubt proposed as to the course to be followed « with regard to those who, being born of non-catholic or unbaptized parents, but baptized in the Catholic Church, have grown up in heresy or infidelity, or without any religion at all, and have contracted marriage with a non-catholic » (see above, n° 77) ; the decree decides « that recourse must be had to Rome, in each case » ; f/ the decree of the C. S. O., of 21 June 1912 (*A. A. S.*, IV, p. 443), which provides that in certain countries, owing to the existence of special conditions, it is sufficient for the validity of mixed marriages that they be contracted in the presence of the parish priest, passively present, as formerly sufficed, without it being necessary for him to ask and receive the consent.

To complete this list, we may add the reply of the S. C. de P. F., of 29 Feb. 1908, declaring that the Decree *Ne Temere* shall have the force of law in the Chinese Empire only from the Easter of 1909 ; Wouters, o. c., p. 16, gives the text of this decision. As to the decrees cited in n° 396, relative to the power of dispensing in the case of Art. VIII, they do not concern directly the Decree *Ne Temere*.

SUPPLEMENT II.

§ 1. FORMS OF SUPPLICA FOR USE IN SEEKING A DISPENSATION.

I. For an episcopal dispensation.

A. *For a marriage* **to be contracted.**

1. *Form for the external forum :*

Illustrissime ac Reverendissime Domine,

Antonius N., ætatis 30 annorum, viduus, parochiæ N., et Antonia N., ætatis 26 annorum, cœlebs, parochiana mea, matrimonium inter se inire exoptant. Obstat vero impedimentum *consanguinitatis*, in tertio gradu mixto cum quarto lineæ collateralis (1), uti adnexum schema indicat (2). Quare humillime supplicant Illustrissimæ Dominationi Vestræ, ut super eo impedimento cum ipsis dispensare dignetur.

Causæ sunt : 1° ætas oratricis superadulta (3) ; 2° orator viduus et quatuor prolibus minorennibus oneratus adjutorio uxoris indiget (4).

1. If the dispensation to be sought concerns licit affinity in the 3rd or 4th degree, spiritual relationship, public decency or public crime, it is sufficient to change the name of the impediment, and to add the exact and full particulars of which we have spoken above, in n° 381. Thus, for the impediment of crime one will specify, for instance, that it results from sexual intercourse established between the petitioners during the existence of the marriage of Antony with his first wife, and complicated by a promise of marriage given and accepted, but without contrivance ; it will be added that the impediment is public (at least materially).

2. *Genealogical tree :*

Petrus N.

1. Carolus. — Carolina N.	1. Paulus N. — Paula N.
2. Bernardus N. — Bernarda N.	2. Joannes N. — Joanna N.
3. Antonius (orator).	3. Josephus N. — Josepha N.
	4. Antonia (oratrix).

3. The decrees of the diocese of Bruges require that the *baptismal certificate* be attached to the supplica.

4. The causes mentioned are given only as an example ; the real causes must be inserted in accordance with what we have said in chapter III, Part 3.

Testor oratores, orthodoxæ fidei cultores, in toto possidere simul 10.000 francorum in re, et 10.000 fr. in spe (1).

Cum summæ venerationis sensu subscribo,
N., parochus parochiæ N.

Die..... mensis..... anni.....

2. *Form for the internal forum :*

Illustrissime ac Reverendissime Domine,

Titius, diœcesis Brugensis subditus (2), matrimonialiter conjungi cupit cum Titia. Obstat vero impedimentum affinitatis primi gradus æqualis, lineæ collateralis, exortum ex copula habita a Titio cum sorore sponsæ (3). Impedimentum est occultum nec timetur manifestandum,omnia autem sunt parata ad nuptias, nec matrimonium, usquedum ab Apostolica Sede obtineri possit dispensatio, differri potest.

Quare humillime supplicat Illustrissimæ Dominationi Vestræ, ut cum ipso, vi indulti pro casu urgenti (4), dispensare dignetur.

Causæ sunt 1° omnia ad nuptias parata ; 2° scandala gravia vitanda.

N., parochus (vel vicepastor) in N.

Die..... mensis..... anni.....

B. *For revalidation of a marriage* **already contracted.**

1. *Form for the external forum :*

Illustrissime ac Reverendissime Domine,

Bernardus N., parochiæ N., 30 annorum, et Maria N., 23 annorum, parochiana mea, præmissis de more publicationibus antenuptialibus, matrimonium in facie Ecclesiæ bona fide contraxerunt et successive consummarunt ; innotuit autem impedimentum consanguinitatis in 3^io gradu æquali collaterali, quemadmodum ex adnexo schemate liquet (5).

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1. If the petitioners are poor, it is customary to say « tam pauperes et miserabiles ut solo labore manuum victum sibi comparare cogantur ».

2. A Bishop can dispense directly only in favour *of those of his own diocese* thus the mention of diocese is required.

3. If the impediment arises *from crime*, it is evident that particulars of it must be given here, and the supplica must be presented in the name of the engaged parties.

4. If it is a question of an impediment where the Ordinary can dispense only in virtue of his ordinary power, e. g., the impediment of crime with contrivance, the supplica will be worded accordingly, and an episcopal dispensation in virtue of the ordinary powers will be asked for, care being taken to add that it is a matter of such urgent necessity as not to leave time for recourse to Rome.

5. A genealogical tree of the parties concerned must be attached to this supplica.

Quare, cupientes matrimonium convalidari, humillime supplicant Illustrissimæ Dominationi Vestræ, ut super præfato impedimento dispensare et prolem natam legitimare dignetur.

Causæ sunt: 1° matrimonium bona fide contractum; 2° formalitates civiles adimpletæ; 3° proles legitimanda.

Testor oratores... (uti sub A, 1°).

2. *Form for the internal forum:*

Illustrissime ac Reverendissime Domine,

Titius et Titia, aliàs, adhuc vivente prima oratoris uxore, se carnaliter cognoverunt, fidemque sibi invicem dederunt de matrimonio inter se contrahendo si dicta uxor præmoreretur; qua deinde e vivis erepta, neutro tamen oratorum in ejus mortem machinante, matrimonium inter se publice, præmissis de more publicationibus, in facie Ecclesiæ mala fide contraxerunt ac successive consummarunt.

Dum autem dicti oratores, ob impedimentum ex præmissis, de quibus plurimum dolent, proveniens, quod occultum est, in dicto matrimonio remanere nequeant absque dispensatione, pro suæ conscientiæ quiete humillime recurrunt ad Illustrissimam Dominationem Vestram, ut cum ipsis super memorato impedimento, vi indulti apostolici, dispensare dignetur.

Causæ sunt: gravissima scandala vitanda; periculum concubinatus.

Cum omni... (uti sub A, 2°).

C. *For obtaining* **revalidation of a dispensation.**

1. *Form for the external forum:*

Illustrissime ac Reverendissime Domine,

Jacobus N., et Anna N., parochiani mei, in eo sunt ut nuptialiter copulentur, dispensatione ab Illustrissima Dominatione Vestra obtenta et fulminata super impedimento consanguinitatis in tertio gradu lineæ collateralis æqualis. Atvero bona fide reticitum est in instantia hunc consanguinitatis gradus esse *duplicem*, ut videre est in schemate adnexo.

Quare humillime supplicant Illustrissimæ Dominationi Vestræ ut revalidationem obtentæ dispensationis concedere dignetur, *perinde ac* si veritas in instantia expressa fuisset (1).

Cum summæ venerationis sensu subscribo,

N., parochus in N.

Die..... mensis..... anni.....

1. If it is a question of some other impediment not properly expressed, the necessary changes must be made; and, if the internal forum comes in, fictitious names must be employed.

2. *Form for the internal forum :*

Illustrissime ac Reverendissime Domine,

Titius et Titia, volentes inter se matrimonialiter copulari, dispensationem obtinuerunt super impedimento consanguinitatis in tertio æquali gradu collaterali. Jamvero dispensatio hæc nulla est ob impedimentum, omnino occultum et nullatenus manifestandum, affinitatis in primo gradu collaterali, ex copula illicita Titiam inter et fratrem Titii.

Quare, cum omnia sint ad nuptias parata, nec matrimonium, usquedum ab Apostolica Sede obtineri possit dispensatio, absque periculo gravis scandali differri queat, humillime deprecatur Titia Illustrissimam Dominationem Vestram, ut, revalidando dispensationem super memorato impedimento publico obtentam, super isto quoque affinitatis impedimento dispensare dignetur.

Causa est : scandala et gravissima mala præcavenda.

Cum omni venerationis sensu,
N., confessarius in N.

Die..... mensis..... anni.....

II. For an Apostolic Dispensation.

A. *For a marriage* **to be contracted.**

1. *Form for the external forum :*

a/ *In case of consanguinity or of licit affinity, in the near degrees :*

Illustrissime ac Reverendissime Domine,

Josephus N., ætatis 35 annorum, viduus, parochiæ X, et Magdalena N., 30 annorum, cœlebs, parochiana mea,matrimonio inter se copulari cupiunt. Obstat vero impedimentum affinitatis ex copula licita in primo gradu lineæ collateralis æqualis, ex eo proveniens quod orator sit viduus ex sorore oratricis. Quare humillimè supplicant Illustrissimæ Dominationi vestræ ut super dicto impedimento dispensationem S. Sedis impetrare dignetur, necnon prolis natæ vel nascendæ legitimationem (1).

Causæ sunt : Periculosa vitæ conversatio cum copula carnali non semel admissa ; sponsus duabus prolibus minorennibus gravatus uxoris indiget adjutorio, et oratrix ad eas proles educandas idonea dicitur.

1. Observe here, as stated in nº 393, that a decree of legitimation must be asked for only when it is foreseen that there will be need of it ; hence one can refrain from doing so when it is obvious that the child will not be born until after the execution of the dispensation, since it will then be legitimated by the subsequent marriage. See nos 166, 362, 382.

Testor oratores, orthodoxæ fidei cultores, adeo pauperes ac miserabiles esse ut solo manuum labore vivant. Solvent tamen pro expensis 10 francos, quos apud me deposuerunt (1).

Cum summæ venerationis sensu subscribo,
N., parochus in N.

Die..... mensis..... anni.....

b/ *In case of mixed religion :*

Illustrissime ac Reverendissime Domine.

Lætitia N., Romano-catholica, 25 annorum, parochiana mea, matrimonium inire cupit cum Francisco N., baptizato sed Anglicanæ hæresi addicto, et in errore hucusque pertinaci.

Quare humillime supplicat Illustrissimæ Dominationi Vestræ ut super impedimento mixtæ Religionis dispensationem S. Sedis impetrare dignetur.

Causæ sunt : 1° vani conatus ut oratrix matrimonio renuntiet ; 2° fundata spes conversionis partis acatholicæ ; 3° periculum matrimonii civilis.

De cætero ambæ partes, catholica et acatholica, paratas sese exhibent ut clausulas adimpleant et cautelas præstent ab Ecclesia præscriptas, et ab Illustrissima Dominatione Vestra scripto exigendas ; nec ullum serium subest motivum de eorum sinceritate dubitandi.

Pars catholica pro expensis apud me deposuit... francos.

Cum summæ venerationis sensu subscribo,
N., parochus in N.

Die..... mensis..... anni.....

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1. This is only a kind of provisional supplica for transmission to the Official, who will thereupon draw up the supplica, properly so called, for transmission to Rome, conceived in the following or like terms :

Beatissime Pater,

Josephus N...., ... annorum, viduus, et Magdalena N...., cœlebs, ... annorum, diœcesis Brugensis subditi, ad pedes S. V. humiliter provoluti, devotè implorant dispensationem super impedimento affinitatis in primo gradu lineæ collateralis æquali, ex eo proveniente quod orator sit viduus ex sorore oratricis.

Causæ sunt.... uti suprà.

Gustavus Josephus Waffelaert Episcopus Brugensis testatur oratores, diœceseos Brugensis subditos, esse vere pauperes et miserabiles, ex sua industria et manuum labore viventes, ac nullius taxæ esse capaces.

Quodsi oratores sunt quasi-pauperes vel divites, parochus in sua supplica testatur eos « hujusmodi esse fortunæ ut ambo simul possideant.... in re et.... in spe ». Episcopus autem ex sua parte testatur « oratores, orthodoxæ fidei cultores, taxæ.... francorum in totum esse capaces ».

2. *Form for the internal forum :*

a/ *If the business of drawing up the supplica for Rome is entrusted to the Ordinary* (1).

Illustrissime ac Reverendissime Domine,

Titia, diœcesis nostræ subdita, olim votum perpetuæ castitatis, (vel ingrediendi religionem approbatam) emisit. Jamvero prudenter judicatur statum conjugalem, cujus opportuna occasio sese offert, ipsi futurum esse magis salutarem.

Quare humillime supplicat Illustrissimæ Dominationi Vestræ ut dispensationem Sanctæ Sedis super præfato voto procurare ipsi dignetur, ut Matrimonium inire et debitum conjugale licite petere ac reddere valeat.

Causa est : 1° quod nisi nubat, in certo periculo salutis versatur ; 2° quod ad negotia gerenda jam viro carere non potest ; 3° quod, quum sit pauperrima, hoc Matrimonio melius vitæ sine egestate transigendæ consulit ; 4° quod oratrix ob ingentes stimulos carnis, se posse continenter vivere diffidit, etc.

Cum summæ venerationis sensu subscribo,
N., confessarius ecclesiæ N.

Die..... mensis..... anni.....

b/ *If the confessor himself draws up the supplica* (2).

Eminentissime Domine,

Titius, fidei catholicæ cultor, matrimonium inire cupit cum Bertha, (quam et) cujus sororem germanam carnaliter cognovit. Cum autem dicta carnalis copula cum præfata mulieris sorore sit occulta, et, nisi orator cum Bertha matrimonium contrahat, periculum immineret scandalorum, ad hujusmodi scandala evitanda et pro suæ conscientiæ quiete, vehementer exoptat per Sedem Apostolicam absolvi secumque dispensari super contracto impedimento affinitatis illicitæ in primo lineæ collateralis gradu. Quare E. V. enixis precibus orator supplicat ut sibi de opportuno remedio providere faveat.

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1. Theol. Mechl., o. c., p. 446 s.

2. We have said in the course of our treatise that it sometimes falls to the lot of the confessor himself to draw up the supplica to be sent to Rome, notably when there occurs an impediment of the external forum together with one of the internal forum ; he must then state that a dispensation for the external forum has already been obtained, and ask for the revalidation of it at the same time as the dispensation for the internal forum.

The specimen that we give here concerns the impediment of illicit affinity, and supposes it to have been discovered in time for recourse to Rome.

Dignetur E. V. executionem dispensationis committere confessario ex approbatis ab oratore eligendo, atque rescriptum dirigere ad infrascriptum E. V. humillimum famulum N. N., in civitate... via...

B. *For revalidating a marriage* **already contracted.**

1. *By means of a simple dispensation :*

Illustrissime ac Reverendissime Domine,

Fredericus N., ætatis 40 annorum, et Frederica N., ætatis 35 annorum, parochiani mei, præmissis de more publicationibus antenuptialibus, matrimonium in facie Ecclesiæ bona fide contraxerunt et successive consummaverunt ; innotuit autem impedimentum affinitatis legitimæ in secundo gradu lineæ collateralis, ex eo proveniens quod vir viduus duxerat consobrinam germanam præsentis putatæ uxoris, uti ex adnexo schemate liquet (1).

Quare humillime supplicat Illustrissimæ Dominationi Vestræ ut super memorato impedimento dispensationem S. Sedis impetrare dignetur.

Causæ sunt....

Testor oratores... uti suprà, A, 1°, a/ (2).

2. *By means of a sanatio in radice :*

a/ *Form for the external forum :*

Illustrissime ac Reverendissime Domine,

Franciscus N., ætatis 30 annorum, et Maria N., ætatis 28 annorum, parochiani mei, præmissis de more publicationibus quin detectum fuerit impedimentum, matrimonium in facie Ecclesiæ bona fide cum vero ac sincero utriusque consensu, qui asseritur adhuc perseverare, contraxerunt, ac successive consummarunt prole inde suscepta.

Obstat vero impedimentum publicum consanguinitatis in quarto æquali gradu collaterali, ut videre est in schemate adnexo.

Uterque contrahens a paucis diebus nullitatis matrimonii conscius existit, sed vir nullo modo ad renovandum consensum coram parocho et testibus adduci potest *(indicetur quare)*.

Quare oratrix Maria N., ad consulendum conscientiæ suæ, ac conjugem gratiarum matrimonii participem reddere prolemque legitimare cupiens,

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1. There must be added to the supplica a table showing the affinity.

2. When a marriage is null on the ground of an impediment pertaining to the internal forum, it is for this forum that it must be revalidated. For this purpose the same form may be employed, omitting the names and Christian names, and writing it in the name of one only of the parties, if the impediment directly binds only one or arises from the fault of one alone.

humillime supplicat Illustrissimæ Dominationi ut sanationem in radice præfati matrimonii a Sede Apostolica procurare dignetur.

Cum summæ venerationis sensu subscribo,
N., parochus in N.

Die...,.. mensis..... anni.....

b/ *Form for the internal forum :*

Illustrissime ac Reverendissime Domine,

Titius et Titia, cum vero et sincero Titiæ consensu, qui asseritur adhuc perseverare, præmissis de more publicationibus, matrimonium in facie Ecclesiæ contraxerunt ac successive consummarunt. Jamvero hoc matrimonium invalidum est ob impedimentum (omnino occultum ac nullatenus manifestandum) affinitatis in primo gradu collaterali ex antecedenti carnali copula, Titiæ ignota, Titium inter et sororem Titiæ.

Nunc vero orator, de præmissis quamplurimum dolens, ac pro suæ conscientiæ quiete matrimonium convalidare cupiens, fundate timet, ne si qualicumque modo consensus renovatio a putata uxore petatur, eam ipsa vel recuset, vel saltem pax domestica ob violentas suspiciones ac acerbissimos mores conjugis gravissime inde turbetur.

Quare, optans in gratiam Dei redire, conjugem gratiarum matrimonii participem reddere et numerosam sobolem legitimare, humillime deprecatur orator Illustrissimam Dominationem Vestram, ut sanationem in radice præfati matrimonii a Sede Apostolica impetrare dignetur (1).

Cum summæ venerationis sensu subscribo,
N., confessarius in N.

Die... mensis... anni...

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1. These last forms are taken in great part from JODER, o. c. The *Collat. Brug.*, t. VI, p. 602, mention yet another form for obtaining revalidation in radice, worded by the Ordinary of Bruges, for a case in which Rome granted revalidation according to the form proper to the internal forum, but in such a way as to serve also for the external forum.

This is the form :

Beatissime Pater,

Titius et Titia, diœcesis Brugensis, præmissis de more publicationibus, nulloque detecto impedimento, cum vero consensu qui adhuc perseverat, matrimonium in facie Ecclesiæ contraxerunt et successive consummaverunt. Jamvero matrimonium istud nullum est ob impedimentum *publicum* affinitatis illicitæ in primo et secundo gradu mixtæ lineæ collateralis, ex eo proveniens quod Titia, quatuor abhinc annis, copulam fornicariam, ex qua nata proles, habuerit cum avunculo Titii. Impedimentum casu omnino fortuito innotuit parocho, qui rem, tacitis nominibus, Episcopo Brugensi exposuit, declaravitque putatos conjuges

C. *For obtaining* **revalidation of a dispensation.**

Illustrissime ac Reverendissime Domine,

Bernardus N., et Elisabeth N., parochiani mei, matrimonium inituri, dispensationem Apostolicam obtinuerunt super consanguinitate in primo mixto cum secundo gradu lineæ collateralis. Ast innotuit obstare impedimentum cognationis spiritualis, ex eo quod orator oratricem e fontibus levaverit : quod impedimentum bona fide fuit reticitum.

Quare humillime supplicant Illustrissimæ Dominationi Vestræ, ut dispensationis convalidationem simul ac dispensationem super cognatione spirituali a S. Sede impetrare dignetur.

Causæ sunt :.... etc.

Cum summæ venerationis sensu subscribo,
N., parochus in N.

Die..... mensis..... anni.....

§ 2. OTHER FORMS.

A. *Form of betrothment :*

N.N,, son of..., aged..., living at..., and N. N., daughter of..., aged..., living at..., mutually promise to marry one another in due time.

this... day of... 19...

Signatures of the engaged parties,

Signature of the parish priest or of the two witnesses.

N. B. Seeing that N. N. does (do) not know how to write, this deed is signed by an additional witness (1).

Signature...

---

in omnimoda bona fide versari, eosque non sine gravissimis incommodis de matrimonii sui nullitate, *quam nemo cæteroquin ex loci incolis suspicatur*, posse moneri. Quum hisce in adjunctis uti non præsumat Episcopus Brugensis indulto *(de quo supra)*, quo, ad vices aliquot, gaudet dispensandi, quando accidit ut post matrimonium sine prævia dispensatione contractum, innotescat putatos conjuges publico impedimento affinitatis ex copula illicita ligatos esse, supplex rogat Sanctitatem Vestram ut matrimonium putatorum conjugum de quibus supra, in radice sanare ac proles exinde nascituras legitimas declarare dignetur. Et Deus.

1. Where only one of the parties does not know how to write, it is very advisable, though not of strict obligation, to have the signature of an additional witness with that of the other engaged party.

B. *Form of notification of marriage to the parish priest of the place of baptism:*

Rever. Domine Pastor,

Reverentiam vestram certiorem facio N. N., ætatis...., filium (filiam) N. N. et N. N., in parochia tua..., die..., mensis..., anni..., baptizatum (baptizatam), coram me infrascripto (vel coram R. D.... a me specialiter delegato) et duobus testibus, N. N. et N. N., die..., mensis..., 19..., legitimè contraxisse matrimonium cum N. N., ætatis..., filia (filio) N. N. et N. N. Quod matrimonium dignetur reverentia Vestra in Baptismi librum referre.

Veneranter subscribo,
N., parochus in N.
(Sigillum parochiale).

Responsum, si forte necessarium, mittere digneris ad...(sender's address).

X..... Die..... mensis..... anni.....

C. *Form for obtaining permission to marry vagi.*

Illustrissime ac Reverendissime Domine,

Theresia, parochiana mea, nuptias ambit ineundas cum Leonardo, ex diœcesi N. oriundo, nunc autem incertas sedes habente nec ullibi domicilium vel mensilem commorationem retinente.

Diligenti facta inquisitione, nihil potui reperire quod sponsi libertati obstet nec parentes dissentiunt.

Quare Illustrissimæ Dominationi Vestræ supplico, ut mihi quid facto opus sit significare dignetur,

Cum summæ venerationis sensu subscribo,
N., parochus in N.

Die..... mensis..... anni.....

SUPPLEMENT III.

MARRIAGE LAW IN THE BRITISH EMPIRE (1).

(Canada is treated separately, in Supplement IV).

Preliminary note. Throughout the greater part of the Empire the basic law of marriage is that of England ; in South Africa, as far north as the Zambesi, in British Guiana and Ceylon it is the Roman-Dutch law ; while in Malta the law of the Catholic Church is predominant. The **Table of Prohibited Degrees,** as printed in the Book of Common Prayer, is part of the law of the land and is general where the English law prevails. Marriages within these degrees were formerly voidable, but by Lord Lyndhurst's Act, 1835, they were made thenceforward void. This act does not apply to New South Wales, Queensland, Tasmania or Victoria. The Act of 1907 made marriage with a deceased wife's sister lawful in England, and this derogation is now very general. Marriage with a deceased wife's sister's daughter is also legalised in Canada, Northern and Southern Nigeria, Lagos, Nyasaland and Somaliland. In South Africa, under the Roman-Dutch law, marriage between a man and his deceased wife's sister or deceased wife's niece, and also between a woman and her nephew by affinity, is legalised by the Cape Act of 1892.

Legitimation by subsequent marriage is not admitted by the law of England, but it is recognised by the law of Scotland, by the Roman-Dutch law and by the law of the Catholic Church. It prevails in Scotland, the Channel Islands, the Isle of Man ; in Malta and Cyprus ; in Quebec ; in St Lucia ; in New South Wales, Queensland, South Australia, Victoria and Tasmania ; in New Zealand ; Mauritius and Seychelles ; in the Gold Coast ; and, under the Roman-Dutch law, in South Africa, British Guiana and Ceylon.

In England, **judicial separation** is obtainable by either party on the ground of adultery or cruelty, or desertion without cause for two years or upwards, or non-compliance with an order for restitution of conjugal rights. Provision is made for obtaining, in certain cases, the equivalent of judicial separation in courts of summary jurisdiction.

Divorce is granted by the High Court of Justice, at the suit of the hus-

1. In the compilation of this supplement great use has been made of « *The Marriage Laws of the British Empire* », by Eversley and Craies, London, 1910, and of other works of reference. (W. Dobell).

band, on proof of the wife's adultery and, at the suit of the wife, on proof of the husband's adultery coupled with cruelty or desertion without reasonable cause for upwards of two years or non-compliance with an order for restitution of conjugal rights, also for certain aggravated forms of adultery. Connivance, condonation or collusion are bars to the obtaining of a divorce. The Majority Report of the Royal Commission on Divorce, Nov. 1912, points to an extension and equalisation of the grounds of divorce. In Ireland (as in England before 1858) divorce can only be obtained by a special act of Parliament. The English law of divorce is applicable in British Columbia and, perhaps, in Manitoba and North West Territories. In British East Africa, the husband's adoption after marriage of a form of religion other than Christian is a ground of divorce. In British India, if a man changes from Christianity to some other religion and goes through the form of marriage with another woman, the Christian wife is entitled to a divorce ; provision is also made for the dissolution of marriages of native converts to Christianity, when deserted or repudiated on religious grounds. In Ceylon the grounds of dissolution are adultery, malicious desertion and incurable impotency at the time of the marriage. In New South Wales and New Zealand, the grounds of divorce are much wider. In British Guiana and South Africa divorce is admitted for adultery or malicious desertion and, in the Orange Free State, on imprisonment of the husband for life for assault on his wife.

Legal provision for granting divorce is very general, though not universal, throughout the Empire.

Clinical marriages *in articulo mortis*, i. e., marriages without the preliminaries ordinarily required by law, are legislated for, with varying conditions and effects, in Barbados, British Guiana, Grenada, Jamaica, St. Lucia, St. Vincent, Trinidad, Tobago, Mauritius, Seychelles, Ceylon and Hong Kong.

I. Betrothment.

Apparently, a mutual promise of marriage is nowhere recognised as debarring the respective parties from contracting marriage with a third party. The only legal redress open to the injured party is to institute an action for breach of promise, claiming damages for the wrong done.

II. Marriage.

ENGLAND.

By the law of England, marriage is a civil contract which, when valid, endures till the death of one of the parties, unless, previously annulled or dissolved by some competent authority.

1. **Consent.** The free and mutual consent of the parties, expressed in accordance with the requirements of the law, is essential to the contract. The legal age for consent is fourteen in the male and twelve in the female. Those not *sui juris* require the consent of parents or guardians, but the absence of this does not invalidate the marriage.

2. **Impediments** are of two kinds, canonical and civil. *Canonical* impediments, also known as impeditive, render a marriage voidable. If a marriage has been contracted under such an impediment as impotency, error (*personae* only), fraud and force, the marriage is good in law until it has been annulled by a competent tribunal. The parties may, if they wish, treat the marriage as binding, and it carries with it all the civil privileges of a true marriage. On the other hand, the existence of an impeditive impediment may be put forward as the ground for claiming the annulment of the marriage. If the suit is successful, the marriage is rendered void *ab initio*. Such a marriage can be inquired into only during the lifetime of both parties, and only in proceedings instituted for the express purpose of obtaining a declaration of nullity. The impediment cannot be alleged against the validity of the marriage after the death of one of the parties.

Civil impediments are diriment. Thus, consanguinity and affinity, prior and existing marriage, want of age, actual insanity or mental incapacity incompatible with consent, and neglect of the necessary formalities render a marriage void, that is to say, good for no legal purpose. A marriage contracted under such an impediment is invalid and the parties are free to marry again. It is obvious that in certain cases, for instance where insanity is alleged, legal proceedings may be necessary, not for the purpose of obtaining a declaration of nullity, but to determine the existence of the impediment. The invalidity of a marriage contracted under a civil impediment may be alleged in any legal action during the lifetime of the reputed husband and wife or even after their decease.

The impediment of consanguinity and affinity affects the half-blood equally with the whole blood and applies to those of illegitimate birth. Affinity arises only from marriage.

3. **Celebration** and **Formalities required by law**. Marriage may be celebrated either in accordance with the rites of the Church of England, or not in accordance with the rites of the Church of England. In the former case, it must be preceded either by publication of banns, or by special licence, or by common or ordinary's licence, or by the registrar's certificate. The marriage must take place in the presence of a duly ordained minister of the Church of England, and, except in the case of a special licence, in the church in which the banns have been published or that is named in the licence. In the latter case, the registrar's certificate must be obtained and the marriage may then be celebrated in a registered building certified to be

set apart or religious purposes by the governing body or trustees of the building. With Catholics the trustees include the Bishop or Vicar General of the diocese (61 & 62 Vic., cap. 58). The consent of the priest in charge, etc. is necessary before a marriage can take place in such a building. Marriages of this kind require the presence of the registrar or, under the Marriage Act of 1898, the presence, of an authorised person. The Bishops have not adopted this Act and the presence of the registrar is necessary at Catholic marriages. During some part of the ceremony the contracting parties must make, in the prescribed form, a declaration of no impediment and of mutual consent.

The law permits those who do not wish for any religious service to be married at the registrar's office. There are special regulations affecting marriages of Quakers and of Jews. Marriages, unless by special licence, must take place between 8 a. m. and 3 p. m.

Marriages before a Church of England minister are **registered** by him; others, in accordance with legal requirements, by the registrar, authorised person, etc.

IRELAND.

1. **Impediments** are the same as in England. Marriage with a deceased wife's sister is valid.

2. For Catholics, Protestant Episcopalians and Presbyterians, marriage may be **celebrated** after publication of banns, or by special licence, or by ordinary licence.

Where both parties are Catholics, banns are published on three consecutive Sundays or holydays. Special licence is granted by the Bishop of the diocese in which both parties, being Catholics, reside; the parties must also obtain a certificate from the registrar of the district in which the marriage is to take place. An ordinary licence, granted by the person nominated for the purpose by the Bishop, may be issued when both parties are Catholics, or when one party only is a Catholic. The registrar's certificate must be obtained where the marriage is a mixed one.

Marriage of Quakers and of those of other denominations takes place by special licence, by ordinary licence, or on the registrar's certificate. No special licence can be granted for the marriage of Jews. Persons desiring no religious ceremony can be married before the registrar.

SCOTLAND.

1. The **impediments** recognised by the law of Scotland are: — *Nonage*, i. e., want of age, fourteen in the male and twelve in the female. *Impotency*, rendering marriage voidable at the instance of the other party. *Insanity* or

mental incapacity produced by drunkenness, at the time of the marriage. *Consanguinity and affinity ;* parties related within the forbidden degrees cannot legally marry, and such as do so are liable to prosecution for incest. Affinity arises only from consummated marriage. *Prior and existing marriage. Adultery* between the divorced party and paramour, if declared by the sentence of the competent tribunal in Scotland, is a bar to their subsequent marriage there. The usual practice is to omit the name of the paramour in the sentence.

Deliberate and unconditional **consent** *de praesenti* is the essential requisite of the marriage contract, and marriages in Scotland accordingly fall into two classes : — **Regular**, i. e., celebrated by a minister of religion in accordance with the forms established or recognised by law. **Irregular** or clandestine, i. e., celebrated otherwise than in accordance with such forms. *Regular marriage* : No direct provision is made for marriage before any civil officer. Regular marriage takes place before a minister of religion in the presence of at least two witnesses, a/ after publication of banns, or b/ after due notice to the registrar and the issue of his certificate. The presence of the registrar is not required. No particular ceremony or place is prescribed, and the marriage may take place in a private house. *Irregular* or clandestine marriage is valid but illicit. For validity the law requires that one of the parties should, at the date of the contract, have his (or her) usual place of residence in Scotland or should have lived there for twenty-one days immediately preceding the marriage. Apart from this, all that is required is distinct evidence of a mutual agreement between the parties *per verba de praesenti* to become husband and wife immediately from the time the mutual consent is given. Recognition of the marriage can be obtained. The usual way is by « confession » of the offence before the sheriff, who records the conviction in the records of his criminal court and gives an extract of the entry to the parties. He usually imposes a fine amounting to the recognised marriage fee.

Legitimation by subsequent marriage is recognised and depends on the fact of the marriage.

Channel Islands.

In Guernsey, Alderney, Herm, Sark and Jethou, the table of prohibited degrees has not been altered. In Anglican churches marriage takes place as in England ; elsewhere the presence of the registrar or his deputy is required. In Jersey marriage with deceased wife's sister has been legalised.

Isle of Man.

Impediments are as in England. Marriage with deceased wife's sister is

legal. The chancellor of the island can give the consent required in the case of minors, where it is unreasonably withheld or cannot be obtained owing to absence or insanity.

MEDITERRANEAN POSSESSIONS.

CYPRUS. Native Christians are subject to the law of the community to which they belong. British subjects (other than Mahommedan) may be married according to their own rites on the district marriage officer's certificate or on the Governor's special licence. Mahommedans are subject to their own law.

GIBRALTAR. The law of England, as of 31 Dec. 1883, is in force, subject to local ordinances and Orders in Council. Marriage with a deceased wife's sister is legal. Notice must be given to the registrar, who grants a licence or certificate. Marriage may take place before the registrar, or in a registered church or building in the presence of two witnesses besides the officiating minister.

MALTA. The marriage laws are those of the Catholic Church, but unmixed marriages (of Protestants) before an Anglican clergyman are valid by inveterate usage. The validity of marriage before Presbyterian and Wesleyan ministers does not seem to be so clearly established. Legitimation by subsequent marriage is recognised, and has been allowed even in the case of an adulterine child.

NORTH AMERICAN POSSESSIONS.

CANADA is treated separately in Supplement IV.

NEWFOUNDLAND. The marriage law rests on the common law of England as modified by colonial legislation. No change has been made in the table of prohibited degrees and there is no statute giving jurisdiction to dissolve marriage. Marriage may be celebrated by a person in holy orders, a resident and recognised minister of a church or chapel, a duly appointed officer of the Salvation Army, or, when licensed by the Governor, by a teacher of religion or, in certain circumstances, by a layman without any religious qualification.

THE BERMUDAS. The general law rests on the law of England of 1612 modified by island legislation. There is no change in the prohibited degrees and Lord Lyndhurst's Act does not apply. No marriage is valid unless celebrated by an incumbent or licensed minister after publication of banns or grant of licence. Where both parties are Quakers or both are Jews the Governor's licence is required.

WEST INDIES AND CENTRAL AND SOUTH AMERICA.

BAHAMAS. The English law (modified) prevails. Marriage with deceased wife's sister is legal. Lord Lyndhurst's Act does not apply. Marriage must take place before a registrar of marriages or before a minister of religion or other person appointed by the Governor, ordinarily on a certificate of a registrar or other marriage officer, or on the Governors' licence.

BARBADOS. Marriage with deceased wife's sister is legal. Marriage takes place after publication of banns, licence, or notice to police magistrate. It may be celebrated by any minister of the Christian religion after banns published by him (or by another), or on the Governor's licence.

BRITISH GUIANA. Marriage laws depend on local ordinances and the Roman-Dutch law. Inter-marriage with aborigines is forbidden and is void. The Governor may appoint as marriage officer any male minister of the Christian religion, ordained or otherwise. For the celebration of a marriage there must be either a Governor's licence, a certificate of publication of banns, or a certificate of superintendent registrar. Civil marriage takes place before the latter and two witnesses, at his office.

BRITISH HONDURAS. Marriage with deceased wife's sister is recognised. Marriage must be celebrated before a registered minister of religion or district magistrate and two witnesses.

JAMAICA. The law provides for the appointment of civil registrars and of ministers of religion as marriage officers. Marriage may take place on registrar's certificate, or marriage officer's certificate, or licence issued by the Governor. a justice of the peace, etc. The law requires the marriage officer to set up at the principal door of the church a statement of the particulars of the marriage notice. When this has been done for seven clear days, the publication of banns is considered complete.

WEST AFRICAN POSSESSIONS AND PROTECTORATES.

GAMBIA. The law is that of England. The prohibited degrees have not been altered. Marriage takes place, after publication of banns, before the minister of the church in which the banns were published. If the Anglican rite is not observed, each party must make during the ceremony a declaration of no impediment and of marriage consent. The Governor's licence may take the place of banns.

GOLD COAST. Christian and civil marriage is regulated by ordinances providing for the appointment of registrars and of ministers of religion as marriage officers, and for the licensing of places of worship for the celebration of marriage. A registrar's or marriage officer's certificate, or a special licence from the Governor is required.

Northern Nigeria. The prohibited degrees are as in England, but a man may marry the sister or niece of his deceased wife. Marriage by banns is not in use; a certificate of a deputy registrar or a licence from the High Commissioner must be obtained. The latter may license any place of public worship for the celebration of marriages, and a recognised minister of such may celebrate the marriage, with open doors in the presence of two witnesses. Marriage may also be celebrated in the deputy registrar's office.

Sierra Leone. For Christian marriage the prohibited degrees are those of the English law. Marriage may be by banns, or, if neither party is a native, by licence of the governor or district commissioners. The marriage must take place in a place of public worship, according to the rite of the denomination, and in the presence of two witnesses. Marriage *in articulo mortis* is not illegal.

Southern Nigeria and Lagos. Prohibited degrees are as in England, but marriage with sister or niece of deceased wife is lawful.

St. Helena. The law is that of England for the time being, so far as applicable. Provision is made for celebration of marriage in registered places. Parties must declare that there is no impediment of kindred or alliance, and, in the case of minors, that the required consents have been obtained.

South Africa.

In British South Africa, as far north as the Zambesi, the Roman-Dutch law prevails, and reference is to be had to it as to consanguinity and affinity, capacity to marry and the forms necessary to constitute a valid marriage.

Impediments. A male under fourteen and a female under twelve cannot contract a valid marriage. Insane persons cannot lawfully marry. The prohibited degrees, from which there are now certain derogations, were established by the Political Ordinance of 1850. Previous unchastity of the wife may, under certain circumstances, render marriage liable to be declared void *ab initio*. Marriage between an adulterer and the woman with whom he has committed adultery is void. **Legitimation** by subsequent marriage is recognised. **Divorce** is admitted for adultery or malicious desertion.

Cape of Good Hope. By the Act of 1892 a man may marry the sister of his deceased wife, unless she is the widow of his deceased brother, or any female related to him in any remote degree of affinity, except any ancestor of or descendant from his deceased wife. Thus marriage with a deceased wife's niece and of a woman with her nephew by affinity are considered lawful. The publication of banns or its equivalent is necessary unless a special licence is obtained. If the form of marriage used is other than that of the Church of England or of the Reformed Dutch Church, the parties must in

some part of the ceremony make a declaration of no impediment and of taking each other in marriage.

NATAL. The common law is the Roman-Dutch law. Marriage with a deceased wife's sister has been legalised. Unless licensed for that purpose by the Governor, no minister may solemnise any marriage between natives according to Christian rites.

ORANGE FREE STATE. The common law is based on the Roman-Dutch law and the Political Ordinance of 1850. The lawful age for marriage is eighteen in the male and fifteen in the female. In the collateral line, *inter alia*, marriage is forbidden between brother and sister *by birth*, uncle or great uncle and niece or great niece *by birth*, aunt or great aunt and nephew or great nephew *by birth*, in each case whether the relationship is legitimate or illegitimate. No minister, priest or missionary may celebrate a marriage unless authorised for that purpose by the Executive. Persons so authorised are styled marriage officers. The landdrost, in certain cases, may act as marriage officer. Marriage may take place after banns or on licence.

SOUTHERN RHODESIA. Marriage with deceased wife's sister is legalised. Marriage may be celebrated by a minister of the Christian religion or by a civil officer appointed by the High Commissioner. The law of the territory is that of Cape Colony, with limitations. The administrator has the power of appointing marriage officers.

TRANSVAAL. The marriage law rests on the Roman-Dutch law, on the laws of the South African Republic, and on legislative measures passed since annexation. The prohibited degrees include all persons in the direct line, and in the collateral line to the third degree inclusive, whether related by blood or affinity; also first cousins, when both parents of one are related to both parents of the other as own brothers and sisters. Marriage can be celebrated only after publication of banns or by special licence. Before marriage the parties must appear before the resident magistrate, who must see that the provisions of the civil law have been satisfied and, if necessary, grant the certificate.

BRITISH CENTRAL AFRICA.

Generally speaking the English law is in force, with modifications to meet local requirements.

BRITISH EAST AFRICA.

EAST AFRICA PROTECTORATE. Marriage with the sister or niece of a deceased wife was valid between 1902 and 1904, but is now invalid. Native Christians may marry on adequate notice to the minister, after complying

with the preliminaries usual for them in the denomination to which both parties belong. The officiating minister acts as registrar.

SOMALILAND. Marriage of a man with the sister or niece of his deceased wife is valid ; in other respects the English table applies.

UGANDA. The English table of prohibited degrees is in force. Marriage with the sister or niece of a deceased wife was permitted in 1902 but forbidden in 1904. Most of the registrars of marriages are ministers in charge of missions or congregations. Provision is made for marriages of natives, both of whom are Christians, on complying with the preliminaries usual for natives of the religion to which the parties belong. Ordinarily celebration must be by a minister of the religion of the parties, in a place licensed for marriages.

BRITISH POSSESSIONS IN THE INDIAN OCEAN.

MAURITIUS. Except by authority of the Governor, given for grave reasons, a male under eighteen and a female under fifteen cannot contract marriage. Marriage with deceased wife's sister is legal ; it is forbidden between a man and his niece and between a woman and her nephew, but for grave reasons the Governor may authorise such marriages. No marriage, except *in articulo mortis*, is valid in Mauritius unless celebrated by an officer of civil status.

SEYCHELLES. Provisions very similar to those of Mauritius.

ASIA.

BRITISH INDIA. Marriage is to a very great extent regulated by the religion professed by the contracting parties. Under the Christian Marriage Act, marriage, where one party at least is a Christian, may be celebrated by a person who has received episcopal ordination, by a clergyman of the Church of Scotland, by a minister of religion licensed under the Act, by or in the presence of a registrar appointed under the Act, and by a person licensed under the Act to grant certificates of marriage of native Christians. It would seem that the prohibited degrees in India are not necessarily those of the English law, but rather those that apply to the parties by reason of their domicile and religion ; thus, in a case in which a Catholic married his deceased wife's sister, as such a marriage could be celebrated by dispensation in the Catholic Church, the marriage was upheld.

CEYLON. The Roman-Dutch law is the basis of the law of Ceylon so far as the latter is of European origin. For Christian and Civil marriage the registrar's certificate or a licence is required. The marriage may be celebrated before a minister of the Christian religion in a registered place of

worship or other authorised place, according to the rites of the denomination concerned and before two witnesses. Civil marriage takes place before the registrar, at his office and before two witnesses.

HONG KONG. Marriage is celebrated on the registrar's certificate or the Governor's licence, before the Registrar-General or in a licensed place of worship. A previous affidavit is required as to no impediment and the required consents.

STRAITS SETTLEMENTS and LABUAN, and FEDERATED MALAY STATES.

Seemingly the prohibited degrees (for Christian marriage) are those of England in 1826. Marriage may be celebrated by an episcopally ordained person, by a clergyman of the Church of Scotland, by a minister of the Presbyterian Church of England, by a licensed minister of religion, or in the presence of the registrar.

AUSTRALIA.

NEW SOUTH WALES. The prohibited degrees are as in England. Marriage with a deceased wife's sister was legalised in 1876. Under twenty-one (unless a widower or widow) the written consent of the father (or of his legal substitute) is required. Marriage can be validly celebrated only by a registered minister of religion or by a district registrar. No provision is made as to banns and licences, but a sworn declaration must be made by the parties as to age and absence of impediment. Two witnesses to the marriage are essential. The grounds of divorce include adultery by the husband, habitual drunkenness and neglect of duties by either party, attempted murder of partner, and imprisonment for crime for three years or more.

QUEENSLAND. The English prohibited degrees are in force. Marriage with a deceased wife's sister was made legal in 1877. Parties under twenty-one, not being widower or widow, must produce the written consent of the father or guardian. They must make on oath a declaration of no impediment. The marriage must take place before a registered minister of religion, or the registrar of the bride's district, or an authorised justice of the peace. Two witnesses must be present.

SOUTH AUSTRALIA. The prohibited degrees are the same as in England. Marriage with a deceased wife's sister was legalised in 1870. Marriage may be celebrated only by ministers of religion duly enrolled, or by officiating registrars enrolled for districts where there are no ministers, and by the Registrar-General, deputy registrar and all district registrars. Before marriage takes place, a licence or certificate is necessary and the parties must

sign the prescribed declaration of no impediment. The presence of two or more witnesses to the marriage is required. When either party, not being a widower or widow, is under twenty-one, the written consent of parent or guardian is regularly required. For legitimation by subsequent marriage of parents, the child must be duly registered as his by the father.

Tasmania. The prohibited degrees are as in England, marriage with a deceased wife's sister being legalised in 1874. Parental consent is required, but the absence of it does not invalidate the marriage. Marriage may be celebrated only by registered ministers of religion, the Registrar-General and registrars of marriages. The parties must obtain a licence from an officiating (registered) minister, or a licence or certificate from the registrar. The marriage must take place in the presence of two or more witnesses.

Victoria. The prohibited degrees are those of England, marriage with a deceased wife's sister having been legalised in 1893. Those under twenty-one, not being widower or widow, require the written consent of the father or other legally recognised person, but this is not necessary for validity. The marriage must take place before a registered minister of religion, or the Government statist or a registrar. Neither publication of banns, certificate nor licence is required, but the parties must make a declaration (sworn or affirmed) that there is no impediment and that the required consents have been obtained. There must be two or more witnesses to the marriage.

Western Australia. Lord Lyndhurst's Act was adopted in 1844. Marriage with a deceased wife's sister is recognised as valid. A person under twenty-one, unless a widower or a widow, must produce the written consent of parent (etc.). A prescribed declaration of no impediment must be duly made. Marriage may be celebrated only by a registered minister of religion or other person ordinarily officiating as such, or by the registrar of the district.

New Zealand.

The English table of prohibited degrees has been altered by the legalisation of marriage with a deceased wife's sister and deceased husband's brother. Lord Lyndhurst's Act applies. Marriage may be celebrated by ministers of religion whose names are sent to the Registrar-General by the ecclesiastical or reputed authority of specified religious bodies or, under certain conditions, by authorised persons not belonging thereto, and by registrars appointed under the Marriage Act. If either party, being neither a widower nor a widow, is under twenty-one, the consent of the father etc. is necessary; if consent is unreasonably refused, the marriage may be approved on petition by a judge of the Supreme Court, but absence of the

required consents does not invalidate the marriage. Marriage must be celebrated in the place named in the certificate, with open doors, in the presence of two or more witnesses and of the officiating minister or registrar. If there was no legal impediment to the parents' marriage at the time of its birth, a child may be legitimated by their subsequent marriage on the father registering it as his. The grounds of divorce are : adultery since 1 June 1899 ; wilful desertion without just cause for five years ; habitual drunkenness for four years, and, in the case of the husband, habitually leaving the wife without support or being habitually cruel, or, in the case of the wife, habitually neglecting domestic duties and rendering herself unfit to discharge them ; conviction and sentence to seven or more years' imprisonment for attempt on the partner's life ; and, under certain circumstances, lunacy.

SUPPLEMENT IV [1].

CIVIL LAW AS TO MARRIAGE IN FORCE IN CANADA [2].

I. Betrothment and Banns.

A. In the *province of Quebec* the law does not recognise betrothment; in the *other provinces*, in accordance with the English law still in force, breach of promise of marriage affords ground for an action for damages.

B. With regard to the *publication of banns :*

1. In the *province of Quebec*, unless dispensed with by competent authority [3], there must be *three* publications, on Sundays, at Divine Service.

2. In the *other provinces* [4] it is sufficient to make *one* publication, on Sunday, in the church or place of worship, during religious service [5]. Marriage cannot take place until a week after publication.

II. Marriage.

A. **Celebration.**

1. In the *province of Quebec*, « Marriage must be celebrated publicly before a competent officer recognised by law ». Art. 128. « All priests, parish priests, ministers and other officers authorised to keep registers of acts of civil status are competent to celebrate marriages » (6). Art. 129.

2. In the *other provinces*, marriage must be celebrated before an officer recognised by law and at least two witnesses.

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1. These notes are a résumé of a memorandum drawn up by the Rev. Père Duvic, professor of theology in the scholasticate of the Oblates of Mary, at Ottawa. We have to thank the learned author for his kindness in placing this memorandum at our disposal.

2. In the *province of Quebec* marriage law is regulated by a code modelled on that of Napoleon, but with relatively important modifications.

In the other provinces and in the territories not yet organised, the English law is the basis of marriage legislation; changes have been made in it by special laws introduced in the different provinces.

3. The competent authority is the Bishop; for non-catholics a dispensation or licence can be granted by the civil authority.

4. Except in Nova Scotia and New Brunswick, where the law requires three publications.

5. A dispensation (or licence) exempting from the publication of banns, can be given by an official appointed for the purpose by the Lieutenant Governor.

The recognised officer is every male resident in Canada being the ecclesiastical or lay minister of any church or religious sect whatever and being duly ordained or qualified for that purpose according to the rites of the church or sect to which he belongs.

B. **Impediments.**

1. *Common : previous marriage* undissolved ; *consanguinity* in the direct line, and in the collateral line between brother and sister, uncle and niece, aunt and nephew ; *clandestinity* or absence of the formalities prescribed for the celebration of marriage.

2. *Special :*

In the *province of Quebec, impotency*, whether natural or accidental, constitutes an impediment when it is apparent and manifest (Art. 117) ; *affinity* extends only to brother-in-law and sister-in-law ; the *age* of 14 and 12 is required respectively for the male and the female (Art. 115) ; before the attainment of majority the *consent of parents*, or, in their default, that of the guardian or trustee is required (Art. 119-122).

In the *other provinces*, impotency is not reckoned among the impediments, the required *age* is 14 for male and female alike ; *affinity* extends to uncle and niece, aunt and nephew (1) ; consent of parents or guardian is necessary for infants under 18 in the province of Ontario, and under 21 in the other provinces.

C. **Rights and Duties of Married Persons.**

In the province of Quebec, the articles of the code regulating the reciprocal rights and duties of husband and wife are in all respects conformed to those of the Code Napoléon.

In the other provinces, there is no statutory law relating to this matter : in case of dispute the judges decide in accordance with the natural law.

III. Divorce and Separation.

A. **Divorce.**

In the greater part of the federated provinces the law does not admit divorce. The Dominion Parliament reserves to itself alone the right of granting it by a special act (divorce bill), in particular cases.

A petition for divorce must be addressed to the Senate, which refers the request to a permanent committee composed of nine senators and called the committee of Divorce. The senate, after hearing the report of the committee, discusses the application and allows or rejects it : in the former case, the bill is sent to the Lower House, and, if adopted by it, it obtains the force of law and and divorce is pronounced.

(1) One exception to the impediment of affinity prevails throughout the whole of Canada : a widower is permitted to marry his deceased wife's sister.

B. **Separation.**

In the *province of Quebec*, the law allows separation for specified causes but not by mutual consent.

These causes are : a/ simple adultery on the part of the wife and concubinary adultery on the part of the husband ; b/ refusal of the husband to receive his wife and to provide her with the necessaries of life ; c/ ill-usage, cruelty and grave injury.

In the *other provinces*, if separation is not systematised by law, legal practice at least recognises in the courts the necessary competence to pronounce judicial separation.

SUPPLEMENT V.

CIVIL LEGISLATION IN THE UNITED STATES OF AMERICA (1).

I. Betrothment.

Before the civil law, a mutual promise of marriage does not incapacitate either party from contracting marriage with some other person, but an action for damages lies against the party who, being competent to make the contract, subsequently withdraws from it without just reason.

II. Marriage.

In the United States of America the regulation of marriage rests with the different state legislatures and, though common-law marriages, or marriages merely by mutual consent without solemnization, are valid in some of the states, there are legal requirements which cannot be ignored without exposing the parties involved to fine or imprisonment.

A. Celebration.

In most of the states, a licence issued by the competent authority is requisite for the lawful celebration of a marriage, but in *Georgia*, *Maryland*, *Ohio* and *Delaware*, it may take place on the due publication of banns. In *South Carolina* no licence is required, and in New Jersey it is necessary only when both parties are non-resident in the state. Where a licence is required, it authorises the priest or other minister to perform the marriage ceremony, but it does not always exempt him from the obligation of personal inquiry into the legal capacity of the parties. The licence is not essential for the validity of a marriage.

In all the states *solemnization is required*, that is to say, marriage must take place with the observance of the legal requirements in the presence of a civil or religious functionary, recognised by the law as competent to act in that capacity. Where such functionary is ostensibly competent, actual want of authority on his part does not invalidate the marriage if it be consummated in good faith by either party. Besides justices of the peace and other specified civil functionaries, priests, ordained ministers and, in some states, unordained but licensed ministers can lawfully celebrate marriages,

1. In the preparation of this supplement use has been made of various articles in the Catholic Encyclopaedia and of « Marriage Laws of the United States » in the Ecclesiastical Review Year Book, 1910.

subject to the regulations of the states in which they act. In Maine, women, otherwise eligible, may be appointed to solemnize marriages. Stringent rules are in force regarding marriage returns and registration.

B. Impediments.

Existing marriage. Remarriage where a previous bond is still undissolved by death or by a judicial decree, is everywhere unlawful; but in nearly all the states continuous absence of one party during a number of years, when such party is not known to be living, leaves the other party legally free to contract a fresh marriage. In *Idaho*, one whose spouse has been absent from the state for five years, may marry again.

Consanguinity and Affinity. The prohibited degrees vary in the different states. Marriage of first cousins is forbidden in some states and permitted in others. In *Oklahoma*, the prohibition extends to second cousins. The impediment of affinity is less stringent than in England, and marriage with the sister or brother of a deceased wife or husband seems to be everywhere lawful.

Age. In *Virginia*, the age of consent is 14 for males and 12 for females, but in the rest of the states a higher limit has been fixed, commonly about 18 and 16 respectively. Parental consent is generally required before a licence can be issued for those under age. This age varies in the different states, but is very commonly 21 for males and 18 for females. Minors do not require parental consent for a second marriage.

Defect of mind or body. Physical impotency is everywhere an impediment to marriage, and such marriage may be declared void on the application of the aggrieved party.

In many states marriage with an insane person or an idiot is prohibited, and in the state of *Washington*, this prohibition is extended to those who have been afflicted at any time with hereditary insanity. In other states the insane and idiots are declared incapable of contracting and their marriage is void. This legislation is largely extended to those who are epileptic, imbecile or feeble-minded. In *Indiana*, no licence can be issued where either of the parties is suffering from a transmissible disease. In *Michigan* and *Utah*, no person suffering from syphilis or gonorrhea is capable of contracting a valid marriage. In *Washington*, marriage is forbidden to the victims of pulmonary tuberculosis in its advanced stages and to those afflicted with any contagious venereal disease. In the same state, habitual criminals and common drunkards are subject to the like prohibition. In *Ohio*, no licence can be granted for the marriage of an habitual drunkard or of one who, at the time of application, is under the influence of any intoxicating liquor or narcotic drug. This last provision is also in force in *Indiana*. In *Georgia*, drunkenness brought about to induce consent, renders the marriage void.

Race or Colour. In many states, whites are forbidden to intermarry with negroes or with those of negro descent. In some states this prohibition extends to those who have more than one fourth, and in others to those who have more than one eighth of negro blood. Such marriages are void in *Kentucky, Mississippi, Missouri, Nebraska, North Carolina, Utah* and *Virginia.* In *Tennessee,* they constitute a felony. This prohibition extends to Mongolians in *Arizona, California, Oregon, Mississippi* and *Utah.* In the two states last mentioned such marriages are void. In *North Carolina,* marriage is also void between a Croatan Indian and a person of negro descent to the third degree inclusive. In *South Carolina,* no white man may intermarry with a woman of Indian or Negro race, or with any mulatto, mestizo or half-breed.

III. Divorce and Separation.

In most of the states legal provision is made for divorce *a vinculo* and also for divorce *a mensa et toro,* though in some states this latter is expressly prohibited by law. *South Carolina* is the only state in which no divorce is granted, all laws previously permitting it there having been repealed in 1878.

It is to be noted that in some of the states not only adultery and other impediments or hindrances to the use of marriage, but also certain pre-existing impediments, viz., impotency, consanguinity and affinity, fraud or force, insanity unknown to the other party and existing marriage, which invalidate marriage and more commonly afford ground for annulment, are reckoned among the causes for divorce. With regard to the causes arising after marriage, adultery is the only cause recognised in the State of *New York* and in the District of *Columbia.*

In the majority of the states, adultery, bigamy, conviction of crime in certain classes of cases, intolerable cruelty, wilful desertion for two years, and habitual drunkenness are admitted as causes. In many states this list is enlarged; thus, in *Washington,* there is added a clause, known as the «omnibus provision», by which divorce is permitted for any cause deemed by the court sufficient, provided the court be satisfied that the parties can no longer live together. In *Colorado,* the sentimental cruelty clause, by which cruelty is made to include the infliction of mental suffering, opens the way to great abuse. In *Wisconsin,* divorce is granted where there has been a voluntary separation for five years immediately preceding the date of the action. In *Wyoming,* conviction is extended to conviction for felony or infamous crime *before marriage,* if unknown to the other party. Pregnancy of the wife before marriage by other than the husband is admitted in some states, as well as attempt on the partner's life by poison or other means

showing malice. In *Kentucky*, the existence of a loathsome disease, and also union with a religious society forbidding the continuance of marital relations are included in the causes. In *New Hampshire*, refusal to cohabit for six months, when joined with religious belief, suffices. In *Florida*, divorce obtained by the defendant in another state or country entitles the plaintiff to a divorce, as also does the other party's habitual indulgence in violent and ungovernable temper, or wilful, obstinate and continued desertion for one year. In *Tennessee*, desertion is made to include the refusal of the wife to join her husband in that state; in *Minnesota*, habitual drunkenness for one year is sufficient, and in *Rhode Island*, the excessive use of opium, morphine or chloral is added to habitual drunkenness.

As a rule, divorced parties cannot contract a fresh marriage till after the lapse of a specified time, six or twelve months, and sometimes the guilty party is forbidden to marry the paramour during the life of the petitioner.

For Separation or Divorce *a mensa et toro*, the causes are the same as for divorce a vinculo or are similar to them. Usually separation may be granted at the instance of either party, but in *Minnesota*, the causes assigned indicate that it can only be granted in favour of the wife. Separation may be decreed permanently or for a limited time, and in some states special provision is made for the revocation or suspension of the decree in the event of reconciliation.

Legitimation by subsequent marriage is very generally recognised.

SUPPLEMENT VI.

GERMAN CIVIL LAW.

According to the new code promulgated 18 Aug. 1896 and put into force 1 Jan. 1900.

I. Betrothment (art. 1297-1302).

The new German Code recognises the existence of betrothment, but it does not admit it as a ground of action for enforcing the marriage, and it provides no penalty against betrothed parties who refuse to keep the contract. Nevertheless, it allows the party forsaken the right of claiming reparation or compensation for expenses already incurred with a view to the marriage, and it does so, in opposition to the provisions of the Code Napoléon, even when the engagement has been broken off without any real fault, but simply by cancellation of the contract, unjustified by any grave reason.

II. Marriage.

A. **Celebration** (art. 1316-1322).

Validity of celebration merely requires that the future husband and wife should present themselves in person and together before the civil officer, and make a declaration before him that they wish to be married. The presence of two witnesses and the declaration of the municipal officer that the parties are married are formalities that are not requisite for the validity of the contract.

B. **Impediments.**

1. *Diriment.*

a/ *Absence of the formalities* required for validity of celebration, in accordance with what we have just said (Art. 1324).

b/ *Incapacity* whether perpetual or temporary (at the time of the marriage) to give matrimonial consent (Art. 1325).

c/ *Existence of another valid marriage* (Art. 1326).

d/ *Consanguinity*, legitimate or illegitimate, in the direct line, or in the first degree of the collateral line (Art. 1327. cf. Art. 1310. par. 1 and 3).

f/ In case of restricted capacity [1], *absence of consent* of father, mother

1. Minors together with majors of weak intellect and as such placed under guardianship are the only persons whose capacity is restricted.

or guardian, whose consent is required by the terms of art. 1304 (Art. 1331).

g/ *Error ;* when one of the contracting parties was ignorant that what took place was really a marriage, or was deceived as to the person of the other party, or even as to the quality of the same, in such a way that he would have desisted had he known (Art. 1332 and 1333).

h/ *Fraud or trickery* (Art. 1334).

i/ *Menaces* (Art. 1335).

j/ The case in which the *partner of a former marriage,* who has been declared dead, is *still living.*

2. *Prohibitive.*

a/ *Age :* the *man* must be of age, i, e., he must have completed his twenty-first year ; or he must be assimilated to those of age, i. e., he must have been emancipated and have completed his eighteenth year ; the *woman* must be sixteen at least. She alone can obtain a dispensation from the required age. (Art. 1303).

b/ *Absence of parental consent : legitimate* children under twenty-one require the consent of the father or, failing him, of the mother ; *natural* children must obtain the mother's consent. If a son who has attained his majority (by emancipation) is refused the necessary consent, it can be supplied by the *Vormundschaftsgericht.* (Art. 1305 and 1308).

c/ *Illicit affinity* in the direct line (Art. 1310, par. 2).

d/ *Adoption* : prohibiting marriage between the adopter and the adopted and his descendants, so long as the bond contracted by the adoption lasts (Art. 1311).

e/ *A widow* cannot marry again within the ten months that follow the dissolution of her previous marriage, unless before that period she has been confined or has obtained a dispensation (Art. 1313).

f/ *Omission of the publications,* by the terms of art. 1316.

Besides these impediments the new Code contains certain special prohibitions, mostly concerning military men and other functionaries (Art. 1314 and 1315).

Note. What we have said of *diriment* impediments requires supplementing with the following observations :

1. In the case specified under a/ i. e., when the essential formalities are wanting and no entry has been made in the register, the marriage is absolutely null, and no declaration of its nullity is necessary (Art. 1329). The contract is, so to speak, regarded as non-existent, in the sense of the Code Napoléon.

2. In the other cases, marriage is not regarded as null before declaration of its nullity ; but after that it is regarded as null *ab initio.*

Further, all these impediments are not to be put upon the same level ;

some of them (given under b, c, d and e) afford ground for what is known as *Nichtigkeitsklage,* while others (given under f, g, h, i and j) suffice only for *Anfechtungsklage.* The former are based on reasons affecting public order (like those impediments in Belgium that render marriage null with *absolute* nullity) ; the latter on reasons of private order (as in Belgium the impediments rendering marriage null with *relative* nullity). This is why these latter invalidate marriage only at the will of the parties concerned, as stated in the articles named ; but it is otherwise with the former, saving in the exceptional case provided for in art. 1325. Cf. HOLLWECK, o. c., p. 187 s.

III. Divorce and Separation.

A. **Divorce.**

1. Divorce by mutual consent is not admitted, but only divorce for specified causes.

2. *These causes are* :

a/ Adultery, bigamy and unnatural practices of one of the parties, provided the other has not co-operated in them (art. 1565).

b/ Attempt on the life of the partner (Art. 1566).

c/ Malicious desertion (Art. 1567).

d/ Violation of conjugal duties (Art. 1568), e. g., serious acts of cruelty, the husband's refusal to support his wife, or to keep a promise previously made to contract a religious marriage.

e/ Incurable insanity, lasting three years from the date of the marriage (Art. 1569).

It is to be observed that these causes can no longer be alleged as grounds of divorce after a reconciliation has taken place between the parties (Art. 1570), or after the interested party has had knowledge of the facts in question for six months past (Art. 1561).

B. **Separation.**

1. Separation, i. e., the breaking off of life in common, may be obtained for the same causes as divorce (Art. 1575).

2. It has the same effects as divorce, apart from the power of marrying again. The woman can re-assume her maiden name and take over the entire administration of her property. The guilty party must provide maintenance for the other (Art. 1588).

3. When one of the parties demands separation and the other divorce for a legally sufficient reason, the judge must pronounce divorce (Art. 1575) ; moreover, after the pronouncing of separation, either party can have it converted into divorce (Art. 1576).

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N. B. The references are to the marginal numbers, not to the pages.
Marginal numbers 1-233 will be found in Volume I.
Marginal numbers 234-411 will be found in Volume II.

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APPROBATION.

We willingly approve and highly recommend to the clergy the canonical and theological treatise, *Betrothment and Marriage,* by the Very Rev. Canon A. De Smet, S. Th. L., professor in our « Grand Séminaire » ; this work, full of solid doctrine, bears testimony to considerable labour and great discernment.

Bruges, 20 August, 1912.
† G. J., Bishop of Bruges.

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